85-272

Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ARROW NORTHWEST, INC., A TEXAS CORPORATION, JIM ANDERSON, SANDRA H. ARNOLD, ERWIN J. SUSMAN, CAROL ANDERSON, MARGO A. RUSS, MATT CLASEN, JOHN WILLIAM ALSUP, MARGARET ALSUP, J. GRADY ORR, WENDEL M. RUSS, J. F. (PEPE) BACHOR, ELLIS C. FANCHER, ROBERT C. GREEN and KATHRYN JACOBS,
Petitioners

v.

GREATER HOUSTON TRANSPORTATION COMPANY D/B/A YELLOW CAB COMPANY AND THE CITY OF HOUSTON,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

The Court of Appeals ruled that the City's anti-competitive conduct was exempt as a matter of law from the Sherman and Clayton Acts relying on its formulation of the *Parker v. Brown* doctrine and that Yellow Cab's anticompetitive conduct was exempt as a matter of law under the *Noerr-Pennington* doctrine. The questions presented on this petition are:

1. Is it proper for the Court to infer that the State contemplated anticompetitive conduct based upon broad statutory phraseology to regulate where the State expressly provides that the municipality's actions shall not be "inconsistent with, or contrary to, any Act of the Congress of the United States".

2. Is it proper for the Court to conclude that the "relevant question is not whether the City has transgressed federal law, but whether the Sherman and Clayton Acts apply to the City at all".

3. Is it proper for the Court to infer that the State contemplated anticompetitive monoply conduct where the State Constitution expressly provides that monopolies "shall never be allowed".

4. Is it proper for the Court to state that the *Noerr-Pennington* doctrine is independent of the *Parker v. Brown* doctrine where commercial activity is involved.

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ELLIS C. FANCHER, ROBERT C. GREEN AND KATHRYN JACOBS ("Taxicab Drivers") respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered May 17, 1985.

OPINION BELOW

The Opinion and Judgment of the Court of Appeals, not yet reported, appears in Appendix A to this Petition. The decision rendered by the United States District Court for the Southern District of Texas on the Respondents' Motions for Summary Judgment appears in Appendix B. The Judgment appears in Appendix B.

JURISDICTION

The Opinion and Judgment of the Court of Appeals for the Fifth Circuit was entered on May 17, 1985. This Petition for Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

This case concerns the intended scope of the Sherman and Clayton Acts, specifically 15 U.S.C. Sections 1, 2, 15 and 26, and Texas Revised Civil Statutes, Article 46(d)-1, et seq. The Texas Revised Civil Statutes are set forth in Appendix C.

STATEMENT OF THE CASE

This Petition arises from the District Court's dismissal of the complaint filed by the Petitioners against GREATER HOUSTON TRANSPORTATION COMPANY, D/B/A YELLOW CAB COMPANY, AND THE CITY OF

HOUSTON, Civil Action No. H-80-1630, and thereafter consolidated with pending Action No. H-79-2285. This Application for Writ of Certiorari pertains only to the disposition of Civil Action No. H-80-1630 and does not address the issues pertaining to Civil Action No. H-79-2285, except to the extent that the issues are identical and the arguments apply equally to the disposition of both actions. Petitioners filed their First Amended Complaint on or about November 12, 1980, wherein the Complaint alleges that the *exclusive concession agreement* conspiratorially granted to Yellow Cab by the City of Houston for the exclusive right to pick up passengers at the Houston Intercontinental Airport was in violation of 15 U.S.C. Section 1 and Section 2. This exclusive concession was granted to Yellow Cab in a manner which denied competitors to Yellow Cab access to the process created by the city for awarding this concession.

The Taxicab Drivers' Complaint (Petitioners) alleges that the City of Houston ("City") entered into a contract with Greater Houston Transportation Corporation, d/b/a Yellow Cab Company ("Yellow Cab") in which the City granted to Yellow Cab the *exclusive right* to pick up passengers at Houston Intercontinental Airport. Accordingly, all taxicab drivers operating under permits issued to any person or any entity other than Yellow Cab or by said contract were precluded from obtaining fares or passengers at the Houston Intercontinental Airport. The Trial Court in its Memorandum and Order (Appendix B) under Footnote 2 stated that "the contract was originally an exclusive one, although this fact does not appear from the face of the agreement. The agreement was amended in 1980 so as to require Yellow Cab to permit other licensed taxicab drivers to subcontract with it and

operate at the airport under the same terms and conditions imposed on Yellow Cab". However, the Trial Court stated that with respect to the disposition of this action, "We assume arguendo that the contract is exclusive". Contemporaneous with the granting of the exclusive concession agreement, the City enacted Section 45-10.1 and 45-10.2 of the Code of City Ordinances that prohibit a taxi from picking up passengers at Intercontinental Airport unless the taxi is operated under a concession agreement with the City. Yellow Cab used the exclusive concession agreement to compel taxicab drivers within the Yellow Cab system to operate within their policies and specifically required them to remove their secondary radios, thereby preventing some of the Petitioners from providing personalized taxicab service. Taxicab drivers not within the Yellow Cab system were excluded from picking up passengers at Houston Intercontinental Airport, but would only be allowed to deliver passengers to the Houston Intercontinental Airport.

Yellow Cab negotiated with the City of Houston and entered into the exclusive concession agreement for its monetary and commercial gain, which enabled Yellow Cab to charge its contractors fee of Seventy-Five Cents ($.75) per trip for the privilege of picking up passengers at Houston's Intercontinental Airport, which is over and above the other weekly fees paid by Yellow Cab contractors to Yellow Cab. Further, the City of Houston negotiated and entered into the subject concession agreement for its proprietary and commercial gain, whereunder the City of Houston collects and is paid Seventy Cents ($.70) per passenger collected by Yellow Cab.

Yellow Cab and the City of Houston, acting in concert and combination, have created a *monopolized transporta-*

tion system for the benefit of Yellow Cab and to the exclusion of taxicab drivers not associated with Yellow Cab. The Trial Court stated that it is possible to conclude that these actions could amount to a colorable anti-trust claim if the City is not entitled to the *Parker* exemption (Appendix B).

On November 9, 1983, the District Court granted the Motions for Summary Judgment of the City of Houston and Yellow Cab, entered judgment for Yellow Cab and the City of Houston and dismissed Petitioners' Complaint. The District Court concluded that the "city is shielded from anti-trust liability by the *Parker* doctrine" and concluded that Yellow Cab is shielded from anti-trust liability by reason of the *Noerr-Pennington* doctrine. The judgment dismissing Petitioners' pendent jurisdiction claim resulted in a final judgment of the same date which was appealed to the Fifth Circuit.

The Fifth Circuit acknowledged that the *Parker v. Brown* test requires that the City's anti-competitive conduct be authorized by the State pursuant to a clearly articulated and affirmatively expressed State policy to displace competition with regulation or monopoly service. The Fifth Circuit held that Texas Revised Civil Statutes, Article 46(d)-1, et seq., satisfied this requirement because the statute was broadly phrased and because the regulatory authority granted to the municipality under such broad phraseology was not unreasonably exercised by the municipality and thereupon concluded that the "City's actions are not subject to the constraints of federal anti-trust law." (Appendix A). The Fifth Circuit indicated that the *Noerr-Pennington* doctrine and the *Parker v. Brown* doctrine were independent and that it could be

proper to have judgment in favor of Yellow Cab by allowing commercial *Noerr-Pennington* immunity and a judgment against the City of Houston where the municipality's commercial activity is in violation of the antitrust statutes, but not entitled to *Parker v. Brown* immunity.

In reaching this result, the Fifth Circuit held that the Texas Revised Civil Statute, Article 46(d)-7(c), providing that the municipality's action "shall not be inconsistent with, or contrary to, any act of Congress of the United States," did not prevent the Fifth Circuit from inferring a State intent to grant *Parker* immunity from the broad phraseology of Texas Revised Civil Statutes, Article 46(d)-4 and because the authority granted therein was not unreasonably exercised by the City of Houston. The Fifth Circuit stated that the relevant question is whether the Sherman and Clayton Acts apply to the City at all. By so holding, the Fifth Circuit allows courts to infer a state intent to displace competition with regulation in clear contravention of the state's clear, affirmative and expressly stated prohibition to the contrary. While this Court's opinion in *Town of Hallie v. City of Eau Claire*, ____U.S.____, 105 S. Ct. 1713 (1985) permits the finding of a clearly articulated and affirmatively expressed state policy to displace competition with regulation where the statute clearly contemplates that the City may engage in anti-competitive conduct and that such conduct is a foreseeable result from the broad granting of authority to regulate, this Court's decision does not hold that the courts may assume an *implied* state's intent to displace competition with regulation where the statute *expressly* prohibits anti-competitive conduct which would be in violation of any acts of the Congress of the United States.

REASONS FOR GRANTING THE WRIT

I.

THE TEST AND RATIONALE ANNOUNCED BY THE FIFTH CIRCUIT IS IN DIRECT CONFLICT WITH THE DECISION OF THIS COURT BECAUSE IT HOLDS THAT BROAD STATUTORY PHRASEOLOGY IS SUFFICIENT TO INFERENTIALLY MEET THE "CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED STATE POLICY TEST" WHERE THE SAME STATUTE EXPRESSLY DIRECTS THAT THE MUNICIPALITY'S ACTION SHALL NOT BE "INCONSISTENT WITH, OR CONTRARY TO, ANY ACT OF THE CONGRESS OF THE UNITED STATES".

The Fifth Circuit has devised a new test for municipal immunity from the anti-trust laws which is in direct conflict with the letter and spirit of the test announced by this Court in its various decisions to date. The Fifth Circuit's test for municipality immunity has virtually eliminated the "clearly articulated and affirmatively expressed" standard defined by this Court in *City of Lafayette, Louisiana v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S. Ct. 1123, 55 L.Ed.2d 364 (1978), *Community Communications Co. v. City of Boulder, Colorado*, 455 U.S. 40, 102 S. Ct. 835, 70 L.Ed.2d 810 (1982) and as expanded in *Town of Hallie v. City of Eau Claire*, ——U.S.——, 105 S. Ct. 1713 (1985). It is patently inconsistent with the requirement of the "clearly articulated and affirmatively expressed" standard to allow an inferred state intent to control over an expressed state intent to the contrary. A clearly articulated and affirma-

tively "expressed intent" must always prevail over an "implied intent" determined through judicial construction of broad statutory authority to regulate. The Fifth Circuit's conclusion that City's actions are not subject to the constraints of federal anti-trust laws where the city has not unreasonably exercised its broad authority to regulate seeks to displace this Court's "clearly articulated and affirmatively expressed test" with a new "reasonableness test".

A. THE DECISIONS OF THIS COURT REQUIRE THAT BEFORE ANTI-COMPETITIVE CONDUCT IS EXEMPT FROM THE SHERMAN AND CLAYTON ACTS, THE CONDUCT MUST BE PURSUANT TO A CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED STATE POLICY TO DISPLACE COMPETITION AND THAT STATE NEUTRALITY IS NOT SUFFICIENT.

The Sherman Act prohibits "any person" from monopolizing any part of commerce. 15 U.S.C. Section 2. Recently in *Jefferson County Pharmaceutical Ass'n., Inc. v. Abbott Laboratories,* ____U.S.____, 103 S. Ct. 1011, 1016 (1983), a case applying the Robinson-Patman Act to state purchases, this Court reiterated that the antitrust laws represent a carefully studied attempt to bring within them every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states and the "heavy presumption against implicit exemptions" from the antitrust laws. As to municipal exemption, the Court stated that in *City of Lafayette,* they applied antitrust laws to a city in competition with a private utility, and held that no exemption for local governments would be implied. The Court emphasized the

purposes and scope of the antitrust laws: "[T]he economic choices made by public corporations . . . , designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders." *Abbott Laboratories,* ____U.S. at ____, 103 S. Ct. at 1016-17. Therefore, cities as well as all other subdivisions of the states are subject to the restraints of the Sherman Act and are no more exempt from the Act than are private corporations. *City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 394-408, 98 S. Ct. 1112, 1127-1139 (1978) and *Community Communications Co. v. Boulder,* 455 U.S. 40, 50-51, 102 S. Ct. 840 (1982).

On the other hand, the individual States, while acting as sovereign, are not subject to the Sherman Act. *Parker v. Brown,* 317 U.S. 341, 350-351, 63 S. Ct. 307, 313-314; 87 L.Ed. 315, ____ (1983). The fact that the Sherman Act does not apply to the States does not enable the States to grant immunity to any other "person" covered by the Act by authorizing them to violate the Act or by declaring their action lawful. Therefore, it is only anticompetitive conduct attributable to the States which is exempt from the Sherman Act.

This does not mean a State may not implement its own anticompetitive activities through authorized agents acting on its behalf. Under the *Parker v. Brown* test, "person[s]" otherwise subject to the Act are exempted from the restraints while and to the extent such "person[s]" are acting on behalf of the State at the State's direction or authorization to carry out the state's policy to displace

competition with regulation or monopoly service. *Lafayette,* 435 U.S. at 408-17, 98 S. Ct. at 1134-1139; *Boulder,* 455 U.S. at 52-56, 102 S. Ct. at 841-843. This limited exemption for entities other than States is ". . . simply a recognition that a State may frequently choose to effect its policies through the instrumentality of its cities and towns." *Boulder,* 455 U.S. at 51, 102 S. Ct. at 840.

The purpose of the exemption is to avoid restraining the State's sovereign rights by a restraint of the State's agents. *Parker,* 317 U.S. at 350-351, 63 S. Ct. at 313-314. Therefore, while a city may perform anticompetitive acts while acting on behalf of the State at the state's direction pursuant to the State's policy,

> . . . when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the anti-trust laws. [*Lafayette,* 435 U.S. at 416, 98 S. Ct. 1138; *Boulder,* 455 U.S. at 57, 102 S. Ct. at 844.]

The Court has devised a single test applicable to both private and public entities claiming to act on behalf of the State. This test furthers the policy of federalism without impairing the goals Congress sought by enacting the Sherman Act. See *Lafayette,* 435 U.S. at 415, 98 S. Ct. 1138. This test applies equally to private and public entities because the policy of federalism, i.e., state sovereignty, is not furthered unless the activity in question is attributable to the State acting as sovereign. This is determined by the State's involvement in the activity and not the nature of the person claiming to act on behalf of the State. Likewise, if municipalities were free to make economic choices based solely upon their own parochial

interest, "a serious chink in the armor of the antitrust protection would be introduced at odds with the comprehensive national policy Congress established." *Lafayette,* 435 U.S. at 408, 98 S. Ct. at 1134. This is so because the economic choices made by public corporations are not more likely to comport with these national policies than those made by private corporations. *Lafayette,* 435 U.S. at 403, 98 S. Ct. at 1131.

The test devised by this Court is that a municipality's actions must be pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation. *Lafayette,* 435 U.S. at 413, 98 S. Ct. 1136; *Boulder,* 455 U.S. at 54, 102 S. Ct. at 842. This Court in the *City of Lafayette* stated that this "means only that when the State itself has not directed or authorized an anticompetitive practice, the State's subdivision in exercising their delegated power must obey the antitrust laws". *Lafayette,* 435 U.S. at 416, 98 S. Ct. at 1138; *Boulder,* 455 U.S. at 57, 102 S. Ct. at 844.

Accordingly, this Court has created a bifurcated scope of inquiry in order to determine whether or not the municipality is entitled to the *Parker* immunity. If the activity is either *directed or authorized* by the State, the municipality's activity will be entitled to exemption. This Court in the *Town of Hallie* has clarified the test for the determination of whether the State has "authorized" the particular anticompetitive conduct by determining whether the statute in question clearly contemplates that the city may engage in anticompetitive conduct and if such anticompetitive conduct is a foreseeable result from the broad authority given by the State to the municipality to regulate. However, the determination of whether the State has impliedly authorized (by judicial construction) the

particular conduct must necessarily be a secondary scope of inquiry after there has first been a determination of any state directive, whether authority of prohibiting the particular anticompetitive activity.

B. THE FIFTH CIRCUIT'S TEST ALLOWS THE COURT TO INFER A STATE INTENT TO DISPLACE COMPETITION WITH REGULATION FROM BROAD STATUTORY PHRASEOLOGY WHERE THE SAME STATUTE CLEARLY, AFFIRMATIVELY AND EXPRESSLY STATES THE STATE INTENT AGAINST ANTICOMPETITIVE CONDUCT.

In this case, Petitioners allege that the granting by the City of Houston in favor of Yellow Cab of the exclusive concession agreement violates the federal anti-trust laws. The taxicab drivers contend that the City of Houston is subject to the anti-trust laws because the very statute that authorized the City to enter into a taxicab concession agreement expressly directs the City not to engage in any conduct which would be in violation of any Act of the Congress of the United States which includes, but is not limited to, the federal anti-trust laws. Specifically, Texas Revised Civil Statutes, Article 46(d)-7 provides as follows:

> Section C. Conformity to Federal and State Law: No ordinance, resolution, rule, regulation or order adopted by a municipality pursuant to this Act shall be inconsistent with, or contrary to, any Act of the Congress of the United States or the laws of this State, or any regulations promulgated or standards established pursuant thereto.

Because Article 46(d)-7(c) contains an expressed legislative intent and limitation that the acts of a municipality pursuant to the provisions of the Act shall not be inconsistent with or contrary to any act of the Congress of the United States or the laws of the State of Texas, it is not necessary to ascertain any implied intent as gathered from the four corners of Article 46(d)-1, et seq. Specifically, it is not necessary to determine by judicial statutory construction whether the State of Texas intended to authorize the City of Houston to engage in foreseeable anticompetitive conduct as a result of its exercise of the broad authority to regulate where the very statute specifically directs that the municipality's actions shall not be in violation of the anti-trust statutes.

The test announced by the Fifth Circuit fails to make this distinction. The Fifth Circuit's test allows a finding of a State intent to displace competition with regulation from a judicial construction of a statute that it finds to have broad phraseology if the City has not unreasonably exercised its authority. It is self evident that you cannot have an implied authorization if it conflicts with an express prohibition. To permit such contradiction necessarily undermines this Court's requirement that the municipality's actions be pursuant to a clearly articulated and affirmatively expressed state policy. As a matter of law, a Court cannot find that the State impliedly authorizes anticompetitive activities from the broad authority given to the governmental entity to operate in a particular area and cannot conclude that the legislature contemplated the kind of action complained of when the statute expressly prohibits the type of activity the city contends the legislature contemplated.

The effect of the anti-trust laws and the entitlement to *Parker* immunity pursuant to the granting of an exclusive taxicab concession agreement pursuant to Articles 1175 and 46(d)-1, et seq. has previously been considered in the State of Texas. In 1978 Justice Higginbotham of the Fifth Circuit, then a United States District Judge, rendered his opinion in *Woolen v. Surtran Taxicab, Inc.*, 461 F.Supp. 1025 (N.D. Tex. 1978), which was decided subsequent to the *City of Lafayette, supra.* The question before the Court was whether or not there was a clearly articulated and affirmatively expressed Texas state policy to displace taxicab competition at municipal airports with regulation which is in restraint of trade or a monopoly. After specifically considering Article 46(d)-1, et seq., and particularly Article 46(d)-7 and Texas Revised Civil Statute Article 1175, the court stated that "the conclusion is all but inescapable that the Texas legislature did not contemplate the implementation of anticompetitive activities by municipalities in their operation of airports. While it is conceivable that the latter provision was not intended to encompass the anti-trust laws, its plain meaning cannot be ignored." *Woolen,* 461 F.Supp. at 1031. The Court concluded that Article 46 (d)-7 contained an expressed legislative intent that all municipal actions done pursuant to Article 46(d)-1, et seq. must comply with the anti-trust laws and concluded that "in summary, the Defendants in this case do not enjoy a state action exemption from the operation of anti-trust laws. Their arrangement for providing taxi service at the Dallas-Fort Worth Airport was neither pursuant to a state policy to displace competition, nor essential to any state regulatory scheme, nor required by the state acting as sovereign. Consequently, under the recent Supreme Court decision, Defendants do not

have this escape from the anti-trust laws." *Woolen,* 461 F.Supp. at 1033.

Therefore, the Fifth Circuit's test and decision contradicts the test established in *Boulder, Lafayette,* and *Town of Hallie* because it allows the finding of an implied state authorizaton of anticompetitive conduct in contravention of a clearly articulated and affirmatively expressed state policy prohibiting anticompetitive conduct.

II.

THE FIFTH CIRCUIT'S TEST HOLDING THAT THE RELEVANT QUESTION FOR THE DETERMINATION OF THE *PARKER V. BROWN* IMMUNITY "IS NOT WHETHER THE CITY HAS TRANSGRESSED FEDERAL LAW, BUT WHETHER THE SHERMAN AND CLAYTON ACTS APPLY TO THE CITY AT ALL" CONFLICTS WITH THE DECISIONS OF THIS COURT.

A. THE FIFTH CIRCUIT'S TEST WHICH STATES THAT THE CITY'S ACTIONS ARE NOT SUBJECT TO THE CONSTRAINTS OF THE FEDERAL ANTITRUST LAWS WHERE THE MUNICIPALITY HAS NOT UNREASONABLY EXERCISED ITS AUTHORITY, CONFLICTS WITH THE DECISIONS OF THIS COURT.

This Court has made it abundantly clear that municipalities are subject to the penalties of the federal antitrust statutes save and except when the municipality's anticompetitive conduct is pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation, and that when the state it-

self has not directed or authorized an anticompetitive practice, the state's subdivisions in exercising their delegated power must obey the antitrust laws. *Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories,* 103 S. Ct. 1011 (1983); *City of Lafayette, supra, Boulder, supra.* The Fifth Circuit in the case at hand has stated that "the relevant question is not whether the City has transgressed federal law, but whether the Sherman and Clayton Acts apply to the City at all." The Fifth Circuit also states that the City's actions are not subject to the constraints of the federal anti-trust laws where the City has not unreasonably exercised the authority granted to it under broad authority to regulate. The Fifth Circuit's decision in so holding conflicts with this Court's decisions holding that the municipality's actions are subject to the Sherman and Clayton Acts save and except for conduct done pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with monopoly or regulation. A grant of authority to regulate is not equivalent to a grant of authority to create a monopoly. *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 595-598 (1976), *Mid-Texas Communications v. American Tel. & Tel. Co.,* 615 F.2d 1372 (5th Cir. 1980). The most basic teachings of the *Lafayette* and *Boulder* decisions are that the Sherman and Clayton Acts apply to municipal activities. The relevant questions then necessarily are whether the City has transgressed the federal Sherman and Clayton Acts and whether the transgression was pursuant to a clearly articulated and affirmatively expressed state policy. The Fifth Circuit's decision indicates that the Court concluded and based its holding on the erroneous proposition of law that the City's actions may not be subject to the constraints of the federal anti-trust laws if they are not unreasonably

exercised. By including this new standard, it is clear that the Fifth Circuit is attempting to modify this Court's test of "clearly articulated and affirmatively expressed" state intent by injecting an alternative consideration first set forth by the Fifth Circuit in *Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555 (5th Cir. 1984). To apply this new standard would conflict with the decisions of this Court by granting *Parker* immunity to municipal action which is not done pursuant to a clearly articulated and affirmatively expressed State policy if the municipality has not unreasonably exercised its authority granted to it by the State. The application of this new test would permit *Parker* exemption to any activity of a municipality which is not an unreasonable exercise of its authority and would be in direct contravention of this Court's directive that "when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws." *Lafayette*, 435 U.S. at 416, 98 S. Ct. at 1138; *Boulder*, 455 U.S. at 57, 102 S. Ct. at 844.

III.

THE FIFTH CIRCUIT'S DECISION WILL CREATE AN ANOMALOUS INTERPRETATION OF STATE STATUTES BY ERRONEOUSLY PERMITTING INFERENTIAL INSTRUCTION IN DIRECT CONFLICT WITH EXPRESSED STATE INTENT TO THE CONTRARY.

This Court has heretofore directed that when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the anti-trust laws. *Lafayette*,

435 U.S. at 416, 98 S. Ct. 1138; *Boulder,* 455 U.S. at 57, 102 S. Ct. at 844. The State of Texas with respect to the operation of municipal airports has not directed nor authorized the municipalities to engage in anticompetitive conduct, but rather has expressely directed that the municipalities refrain from engaging in anticompetitive conduct. Notwithstanding such fact, the Fifth Circuit has attempted to construe Texas Revised Civil Statutes, Article 1175 and Article 46(d)-1, et seq. in order to determine whether Texas has authorized the City of Houston to execute an exclusive taxicab concession agreement. In doing this, the Fifth Circuit utilized the construction guidelines set out in the *Town of Hallie, supra* in order to judicially infer the Texas legislative intent. The Fifth Circuit erroneously failed to give proper consideration to Article I, Section 26 of the Texas Constitution (attached hereto as Appendix D) which provides inter alia that

> "Monopolies are contrary to the genius of free government, and shall never be allowed . . ."

This Texas constitutional provision clearly articulates and affirmatively expresses the Texas express policy against the creation of monopolies. A construction of Article 46(d)-7(c) of the Texas Revised Civil Statutes in conformity with the clearly expressed state policy as evidenced by the Texas Constitution under Article I, Section 26, mandates the conclusion that the State of Texas in adopting Article 46(d)-1, et seq. did not intend to displace taxicab competition at municipal airports with regulation which is in restraint of trade or monopoly. *City of Brenham v. Brenham Water Co.,* 67 Tex. 542, 4 S.W. 143 (1887); *Northern Little Rock Transportation Co. v. City of North Little Rock,* 184 S.W.2d 52 (Ark.

144). In the *City of North Little Rock,* the Arkansas Supreme Court in construing an identical constitutional provision which is attached hereto as Appendix E held that the statute authorizing the exclusive taxicab franchise was repugnant to the Arkansas Constitution and therefore was unconstitutional.

The Fifth Circuit rejects this argument and concludes that the granting of the exclusive privilege of picking up passengers at the Houston Intercontinental Airport does not amount to a monopoly in violation of the Texas Constitution by reason of a judicial exception. The *Woolen* case, 461 F.Supp. at 1036-1039, specifically considered these matters and observed that with respect to municipalities as compared to private individuals, and concluded that a municipality is not entitled to avail itself to this exception because the property right to selectively exclude is subordinate to the rights enjoying higher relative rank. That is, these property interests obviously are subordinate to the congressionally mandated policy of the Sherman Act—at least where the asserted property interests are so diluted by public dedication.

IV.

THE FIFTH CIRCUIT'S DECISION WILL CREATE ANOMALOUS APPLICATIONS OF LAW BY ALLOWING COMMERCIAL *NOERR-PENNINGTON* IMMUNITY WHERE THE MUNICIPALITIES COMMERCIAL ACTIVITY IS IN VIOLATION OF THE SHERMAN AND CLAYTON ACTS BUT NOT ENTITLED TO *PARKER V. BROWN* IMMUNITY.

The Fifth Circuit in holding that Yellow Cab is entitled to the anti-trust *Noerr-Pennington* immunity cites

as authority for its decision *Greenwood Utilities Commission v. Mississippi Power Co.*, 751 F.2d 1484 (5th Cir. 1985) wherein the Court held that *Noerr-Pennington* extends to situations where the government enters into a contractual relationship with a private party, and at least in situations "where the government engages in a policy decision and at the same time acts as a participant in the marketplace." The Fifth Circuit held in this case that because the City of Houston was exercising a primarily valid municipal and vicarious state policy, Yellow Cab is therefore entitled to *Noerr-Pennington* immunity. This contention by Yellow Cab was specifically addressed by the City of Houston in this matter by supplemental brief dated March 22, 1985 wherein the City of Houston advised the Court of Appeals as follows:

> "The thrust of Yellow Cab's letter is that under the Fifth Circuit's recent holding in *Greenwood Utilities Commission v. Mississippi Power Co.*, 751 F.2d 1484 (5th Cir. 1985), Yellow Cab is protected from liability in the present case under the *Noerr-Pennington* doctrine regardless of whether the City of Houston has valid *Parker v. Brown* immunity.
>
> "Yellow Cab's position, which would result in a holding that a private party voluntarily entering into an arrangement with a governmental agency can never be subject to the anti-trust laws ignores this Court's ruling in *United States v. Southern Motor Carriers Rate Conference*, 672 F.2d 469 (5th Cir. _____). There the United States claimed that the defendant's submissions of joint rates to state regulatory commissions constituted price fixing in violation of Section 1 of the Sherman Act. The defendants contended, inter alia, that their conduct was not subject to the anti-trust laws because their collective activities consisted solely of attempts to influence

public officials and therefore were not subject to the anti-trust laws under the *Noerr-Pennington* doctrine. In rejecting the Defendant's contentions, this Court held:

> " 'Moreover, the kind of collective action at issue here seems at odds with the thrust of the *Noerr-Pennington* doctrine, which assures public access to the channels of government policy-making. While the joint efforts of the bureaus to secure legislation or commission regulation permitting collective rate-making procedures would clearly fall within the ambit of *Noerr-Pennington* protection, inasmuch as it would seek to influence policy, collective action to determine the rate which the bureau's desire the commission to approve is not of the same genre.'

"672 F.2d at 477. On rehearing *en banc* the panel's *Noerr-Pennington* ruling was reinstated by the full court, 702 F.2d 532, 542 (5th Cir. 1983, [en banc] *cert. granted,* 104 S. Ct. 3508 (1984).

"The *Noerr-Pennington* doctrine is therefore inapplicable to the conduct of which the Plaintiffs complain in this case because Yellow Cab was not attempting to influence and did not influence governmental policy. The City of Houston made a policy decision when it chose to substitute extensive regulation for competition in the cab business in Houston and at the airport. (As we have previously discussed, the City's actions were of the type contemplated by the Texas Statutes governing both taxicab regulation and airports.) The concession arrangements with Yellow Cab and the related city ordinances are analogous to the rate filings in *Southern Motor Carriers* and were actions implementing the City's policy decisions, not actions making policy. Yellow Cab's entering the concession arrangement is essentially dissimilar to the conduct covered by the *Noerr-Pennington* doctrine. For this reason, under *Southern*

> *Motor Carriers*, the *Noerr-Pennington* doctrine is inapplicable and the recent *Greenwood Utilities* case is irrelevant."

Accordingly, the Fifth Circuit has erred in suggesting that the two doctrines remain mutually independent both in origin and in application and by inferentially concluding that Yellow Cab could avail itself to commercial *Noerr-Pennington* immunity where the City of Houston's commercial activity in violation of the Sherman and Clayton Acts would not be entitled to *Parker v. Brown* immunity. The Fifth Circuit further erroneously granted Yellow Cab *Noerr-Pennington* immunity for commercial activities not directed at making governmental policy but merely in the implementation of the governmental policy theretofore promulgated by the City of Houston. The Fifth Circuit's decision will encourage this insidious practice that Yellow Cab has exercised for decades across the United States by allowing taxicab companies antitrust immunity for entering into exclusive concession agreements which incidentally implement the municipality's policy decisions previously made when the municipality's policy decisions are not themselves exempt because they are not done pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with monopoly or regulation. Yellow Cab's conspiratorial conduct was not directed at influencing governmental action (which according to the City of Houston had already been made by the City) but was nothing more than an attempt to interfere directly with the business relations of a competitor.

CONCLUSION

For the foregoing reasons, this Application for Writ of Certiorari should be granted.

Respectfully submitted,

TOM F. COLEMAN, JR.
& ASSOCIATES

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Dated: 8/14/85

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the above and foregoing document has been forwarded to all counsel of record on this the 15th day of August, 1985.

TOM F. COLEMAN, JR.

APPENDIX A

INDEPENDENT TAXICAB DRIVERS' EMPLOYEES, et al., Plaintiffs-Appellants

v.

GREATER HOUSTON TRANSPORTATION COMPANY, etc., et al., Defendants-Appellees,

ARROW NORTHWEST, INC., et al., Plaintiffs-Appellants,

v.

GREATER HOUSTON TRANSPORTATION COMPANY, etc., et al., Defendants-Appellees.

No. 83-2705

United States Court of Appeals, Fifth Circuit.

May 17, 1985.

Two groups of taxicab operators and owners brought federal antitrust action after city, which owned and operated intercontinental airport, granted taxicab company exclusive dominion over airport's taxicab transportation. The United States District Court for the Southern District of Texas, James DeAnda, J., dismissed the complaint, and the two groups of taxicab operators and owners appealed. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) city was immune from federal antitrust liability for having granted taxicab company exclusive

dominion over airport's taxicab transportation, and (2) taxicab company's efforts in securing exclusive airport taxicab concession from city did not fall within a "commercial exception" to *Noerr-Pennington* immunity and, thus, did not render taxicab company liable under the Sherman and Clayton Acts.

Affirmed.

Appeals from the United States District Court for the Southern District of Texas.

Before GOLDBERG, JOHNSON, and DAVIS, Circuit Judges.

GOLDBERG, Circuit Judge:

Plaintiffs-appellants Independent Taxicab Drivers' Employees ("Independents") and Arrow Northwest, Inc. ("Arrow") are two groups of taxicab operators and owners in the City of Houston, a Texas municipality which owns and operates the Houston Intercontinental Airport. On January 1, 1969, the City entered into a contract with the Greater Houston Transportation Corporation, d/b/a Yellow Cab Company, by which the City granted to Yellow Cab an exclusive concession[1] over passenger service at the airport. According to appellants, the arrangement has restrained taxicab competition at the

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1. Although the contract did not on its face provide for exclusivity, we will assume for purposes of this appeal, as did the district court below, that the contract afforded Yellow Cab exclusive dominion over the airport's taxicab transportation. Similarly, we view all relevant facts in the light most favorable to appellants on this appeal from summary judgment for the defendants. *John v. Louisiana*, 757 F.2d 698, 708, 710-11 (1985).

Airport because anyone seeking to operate a cab out of the facility must subcontract through Yellow for the privilege, and Yellow has proved itself loathe to loosen its grip on the Airport market. Non-Yellow taxis must first remove their secondary radios before being allowed to participate in the Yellow pool of taxis for passenger pick-up at the airport, a requirement which impedes these outsider cabs from competing on a par with other companies for passengers who have radioed ahead for service. Moreover, once admitted to the pool, the subcontracting companies are summoned for business by the dispatcher at the rate of one outsider for every fourteen Yellow cabs. If appellants' version of the story approaches the truth, the taxicab market is far from free at Houston Intercontinental. Indeed, one could hardly call it checkered.

The Independents and Arrow filed suit[2] in federal district court under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1982), and sections 4 and 16 of the Clayton Act, *id.* §§ 15, 26, seeking damages from and injunctive relief against the City and Yellow.[3] The district court dismissed the complaint on defendants' motion for summary judgment, holding that the City is immune from antitrust scrutiny under the doctrine of *Parker v. Brown,*

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2. Although appellants filed their suits separately as class actions, the district court certified neither the Independents nor Arrow as a class representative.

3. The complaints also alleged claims under the commerce clause, the equal protection clause, and 42 U.S.C. § 1983, as well as under various state law theories. The district court granted summary judgment for the defendants on each of the federal claims and dismissed the pendent state claims as a matter of trial court discretion under *United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 726, 86 S. Ct. 1130, 1139, 16 L.Ed.2d 218 (1966). *See also Tinker v. DeMaria Porsche-Audi, Inc.,* 632 F.2d 520, 523 (5th Cir. 1980). Appellants contest only the dismissal of their antitrust claims.

317 U.S. 341, 63 S. Ct. 307, 87 L.Ed. 315 (1943), and that Yellow is immune under the *Noerr-Pennington* doctrine, *see United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L.Ed.2d 626 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L.Ed. 2d 464 (1961). We affirm.

I.

[1] Relying on principles of state sovereignty and federalism, the Supreme Court held in *Parker* that the Sherman Act does not reach the anticompetitive conduct of a state speaking through its legislature. 317 U.S. at 350-51, 63 S. Ct. at 313. More recently, the Court has considered the extent to which a municipality may be similarly exempt from federal antitrust scrutiny. Because it is not itself sovereign, a municipality falls within the Sherman Act's prohibition of private anticompetitive conduct unless the municipality can show that its activities were authorized by the state "pursuant to state policy to displace competition with regulation or monopoly public service." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413, 98 S. Ct. 1123, 1137, 55 L.Ed. 2d 364 (1978) (plurality opinion). Until very recently, the specificity with which a state had to declare its sanctioning of anticompetitive municipal conduct was a subject of some debate. Not only did courts struggle with the perplexities of how explicit a state's legislative authorization had to be, but they also agonized over the sufficiency of mere authorization versus compulsion: Did the state have to require anticompetitive conduct of a municipality before the municipality could claim exemption from federal antitrust scrutiny, or would the state's *per-*

mission suffice? If the latter, could a municipality stretch the limits of its empowerment, or did the challenged activity have to be a "reasonable consequence" of municipal regulation in the given area? And finally, could a municipality avail itself of *Parker* immunity absent active state supervision, or did the state have to retain a more active role in order to immunize the non-sovereign entity?

The Supreme Court put to rest much of this ambiguity in *Town of Hallie v. City of Eau Claire*, ____U.S.____, 105 S. Ct. 1713, 84 L.Ed.2d ____ (1985). In *City of Eau Claire*, a unanimous Court reiterated that *Parker* exemption applies whenever the state legislature has "clearly articulated and affirmatively expressed" a state policy to displace competition in the regulated area—that is, whenever "'"the legislature contemplated the kind of action complained of."'" *Id.*, 105 S. Ct. at 1719 (quoting *City of Lafayette*, 435 U.S. at 415, 98 S. Ct. at 1138 (citation omitted)). Moreover, the Court held that "although compulsion affirmatively expressed may be the best evidence of state policy, it is by no means a prerequisite to a finding that a municipality acted pursuant to a clearly articulated state policy." *Id.*[4] After *City of Eau Claire*, clear articulation can comprise authorization short of compulsion. Finally, the Court concluded that the "active state supervision requirement should not be imposed in cases in which the actor is a municipality." *Id.*[5] A clear articulation of state policy

4. *See City of Lafayette*, 435 U.S. at 415, 98 S. Ct. at 1138 ("a specific, detailed legislative authorization" of monopoly service need not exist to infer the necessary state intent"); *see also Hoover v. Ronwin*, ____U.S.____, 104 S. Ct. 1989, 1995, 2001 & n. 33, 80 L.Ed.2d 590 (1984).

5. In this respect, deciding whether *Parker* immunity applies to anticompetitive municipal conduct differs from deciding whether

sets both the floor and the ceiling for municipal invocation of *Parker* immunity .

[2] Applied in the present context, these principles make clear that the City of Houston is immune from federal antitrust liability for its treatment of taxicabs at Intercontinental Airport. Two statutes are relevant. First, Texas empowers its municipalities

> [t]o regulate, license and fix the charges and fares made by any person owning, operating or controlling any vehicle of any character used for the carrying of passengers for hire or the transportation of freight for hire on the public streets and alleys of the city.

Tex. Rev. Civ. Stat. Ann. art. 1175(21) (Vernon 1963); *see also id.* art. 1175(20). Thus, in at least a general sense, the state legislature has vested extensive regulatory discretion in its cities over the taxicab industry.[6] *See Bellew v. City of Houston,* 456 S.W.2d 185, 187 (Tex. Civ. App. 1970). More particularly, though, the state has specifically authorized its municipalities to grant

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Parker applies to the anticompetitive conduct of private parties. *Compare City of Eau Claire,* 105 S. Ct. at 1719-21 *with Southern Motor Carriers Rate Conference, Inc. v. United States,* ____U.S. ____, 105 S. Ct. 1721, 1717, 84 L.Ed.2d ____ (1985) (private parties, and state agencies or officials regulating the conduct of private parties, fall within *Parker* only upon the satisfaction of two criteria: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy.' Second, the State must supervise actively any private anticompetitive conduct." (citations omitted)); *see California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S. Ct. 937, 63 L.Ed.2d 233 (1980); *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 96 S. Ct. 3110, 49 L.Ed.2d 1141 (1976).

6. The City has for years seen fit to exercise this discretion. *See* Houston, Tex., Code of Ordinances §§ 45-1 to -91 (1968).

contracts for the provision of goods and services at their airports:

> (a) . . . In operating an airport . . . such municipality may . . . enter into contracts, leases and other arrangements for a term not exceeding forty (40) years with any persons:
>
> . . . .
>
> (2) conferring the privilege of supplying goods, commodities, things, services or facilities at such airport. . . .
>
> . . . .
>
> In each case the municipality may establish the terms and conditions and fix the charges, rentals or fees for the privileges or services. . . .

Id. art. 46d-4 (Vernon 1969). While the latter provision falls short of expressly mentioning the establishment of ground transportation services, the statute's broad phrasing is a strong indication of the state's desire to abdicate in favor of municipal prescience with regard to airport management.

This indication is all we require. In *City of Eau Claire*, the Supreme Court considered a Wisconsin statute that did not explicitly reflect a legislative expectation of municipal anticompetitive conduct in the provision of sewage services. Dispensing with the argument that the statute failed to articulate state policy specifically enough to implicate the city's *Parker* immunity, the Court observed:

> [I]t is sufficient that the statutes authorized the City to provide sewage services and also to determine the areas to be served. We think it clear that anti-

> competitive effects logically would result from this broad authority to regulate.
>
> . . . .
>
> The [plaintiffs'] argument [for greater specificity] amounts to a contention that to pass the "clear articulation" test, a legislature must expressly state in a statute or its legislative history that it intends for the delegated action to have anticompetitive effects. This contention embodies an unrealistic view of how legislatures work and of how statutes are written. No legislature can be expected to catalog all of the anticipated effects of a statute of this kind.

105 S. Ct. at 1718, 1719. We think it equally clear that the City of Houston might deem it most efficient to confer the privilege of airport taxicab operation on a single company,[7] and that such a decision is a logical or reasonable consequence of the state's broad allocation of authority to the City to run its own airport.

[3] As did the Court in *City of Eau Claire*, we find the decision in *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 102 S. Ct. 835, 70 L.Ed.2d 810 (1982), to be of limited applicability. In *City of Boulder*, the Court held that the Home Rule Amendment to Colorado's constitution "was neutral and did not satisfy the 'clear articulation' component of the state action test." *City of Eau Claire*, 105 S. Ct. at 1719; *City of Boulder*, 455 U.S. at 55-56, 102 S. Ct. at 843. The Home Rule Amendment spoke in only the most general terms, enabling Colorado municipalities to regulate not merely

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7. The district court noted that the City's initial embrace of exclusivity was motivated by the dearth of adequate ground transportation facilities that accompanied the opening of Intercontinental in 1969.

the industry at issue in that case—cable television—but also virtually any area of local concern. The Amendment did not even address the regulation of cable television. In contrast, Texas has delegated the management of both private paid carriers and airports to the state's municipalities through statutes expressly directed toward these ends. We know that the Supreme Court has not granted full license to the states to confer monopoly status with a magical pass of the legislative wand. *See Southern Motor Carriers Rate Conference, Inc. v. United States,* ____U.S.____, 105 S. Ct. 1721, 1729 n. 23, 84 L.Ed.2d ____ (1985). But where a state has to this extent articulated a policy regulatory deference to its municipalities, and where a city has not unreasonably exercised its authority, the city's actions are not subject to the constraints of federal antitrust law.

[4] Appellants object that state policy could not allow for the creation of monopoly power by municipalities because the Texas Constitution expresses in no uncertain terms a distaste for anticompetitive conduct. Tex. Const. art. I, § 26 ("[M]onopolies are contrary to the genius of free government, and shall never be allowed . . ."). We are unpersuaded. The Texas courts have construed this constitutional provision as not extending to "[c]ases in which an exclusive right or privilege is granted upon the property or premises of the grantor." *State v. Gulf Refining Co.,* 279 S.W. 526, 530 (Tex. Civ. App. 1925); *see Schnitzer v. Southwest Shoe Corp.,* 364 S.W.2d 373, 374-75 (Tex. 1963); *Karam v. H.E. Butt Grocery Co.,* 527 S.W.2d 481, 484-85 (Tex. Civ. App. 1975); *Neiman-Marcus Co. v. Hexter,* 412 S.W.2d 915, 917 (Tex. Civ. App. 1967); *see also City of Brenham v. Brenham Water Co.,* 67 Tex. 542, 4 S.W. 143, 153 (1887) (noting that

there are "certain classes of exclusive privileges which do not amount to monopolies"). Houston's ownership of Intercontinental would seem to bring its exclusive concession directly within this exception. More pointedly, though, the Texas caselaw holds that a municipality may confer an exclusive contract for ground transportation service to and from airports owned by the municipality, and that such conferral does not violate the anti-monopoly clause of the Texas Constitution. *Airport Coach Service, Inc. v. City of Fort Worth,* 518 S.W.2d 566, 572 (Tex. Civ. App. 1974); *accord Continental Bus System, Inc. v. City of Dallas,* 386 F.Supp. 359, 364-66 (N.D. Tex. 1974). The Texas Constitution is not inconsistent with the potentially anticompetitive state policy than can reasonably be inferred from the state's broad grant of authority over airport management to municipalities.[8]

II.

[5, 6] We need not pause long over appellants' contention that, even if the City is immune from federal antitrust scrutiny under *Parker,* Yellow can be held liable under the Sherman and Clayton Acts for its efforts in securing the exclusive airport taxicab concession from Houston. On appellants' view, the *Noerr-Pennington* doctrine cannot shield Yellow because (1) the doctrine applies only to "specific attempts to influence public officials, legislation or executive action" rather than to "arm's length contractual negotiations," and (2) even if

8. Similarly, it is of limited significance that the statute authorizing municipal airport management states that the municipality's actions shall not be "inconsistent with, or contrary to, any Act of the Congress of the United States. . . ." Tex. Rev. Stat. Ann. 46d-7(c) (West. Supp. 1985). The relevant question is not whether the City has transgressed federal law, but whether the Sherman & Clayton Acts apply to the City at all.

a private party's arm's length contractual activity does implicate the doctrine, Yellow's relationship with the City falls within a "commercial exception" to *Noerr-Pennington* immunity.[9]

[7] "The *Noerr-Pennington* doctrine provides an exception to antitrust liability enabling citizens or business

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9. Appellants also argue that Yellow's conduct falls within either the sham or co-conspirator exception to *Noerr-Pennington*. *See, e.g., California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 511-15, 92 S. Ct. 609, 612-14, 30 L.Ed.2d 642 (1972); *Affiliated Capital Corp. v. City of Houston,* 735 F.2d 1555, 1567 (5th Cir. 1984) (en banc), *petition for cert. filed sub nom. Gulf Coast Cable Television Co. v. Affiliated Capital Corp.,* ____U.S.____, 105 S. Ct. 1164, 84 L.Ed.2d 316 (1984); *Coastal States Mktg., Inc. v. Hunt,* 694 F.2d 1358, 1368-73 (5th Cir. 1983); *Woods Exploration & Producing Co. v. Aluminum Co. of Am.,* 438 F.2d 1286, 1296-98 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047, 92 S. Ct. 701, 30 L.Ed.2d 736 (1972). *See generally* 1 P. Areeda & D. Turner, *Antitrust Law* ¶¶ 203-04 (1978 & Supp. 1982). We find little support for the point, regardless of which branch of "sham" is asserted. *See generally Coastal States,* 694 F.2d at 1371 n. 42. Appellants have cited nothing in the record other than an allegation in their initial complaint that the defendants conspired to monopolize. *See* Record vol. 4, at 832-34. To the contrary, appellants conceded in their main brief that "[Yellow's] negotiations with respect to the subject exclusive concession agreement was [sic] undertaken at arm's length. . . ." *Brief for Appellant Arrow* at 46; *Brief for Appellant Independents* at 45-46. Thus, while the existence or nonexistence of sham-ful conduct is generally a question of fact for the jury, *Feminist Wowen's Health Center v. Mohammad,* 586 F.2d 530, 543 (5th Cir. 1978), *cert. denied,* 444 U.S. 924, 100 S. Ct. 262, 62 L.Ed.2d 180 (1979), appellants have nonetheless failed to present enough evidence to survive Yellow's motion for summary judgment. *Cf. Metro Cable Co. v. CATV of Rockford, Inc.,* 516 F.2d 220, 228-32 (7th Cir. 1975) (holding that agreement of government official to petitioning entity's anticompetitive plan was insufficient to render the official a "co-conspirator" for purposes of undermining *Noerr-Pennington* immunity). *But cf. Duke & Co., Inc. v. Foerster,* 521 F.2d 1277, 1282 (3d Cir. 1975) ("Where the complaint goes beyond mere allegations of official persuasion by anticompetitive lobbying and claims official participation with private individuals in a scheme to restrain trade, the *Noerr-Pennington* doctrine is inapplicable.").

entities to influence or to petition public officials to take official action that will harm or eliminate competition." *Affiliated Captial Corp. v. City of Houston,* 735 F.2d 1555, 1566 (5th Cir. 1984) (en banc), *petition for cert. filed sub nom. Gulf Coast Cable Television Co. v. Affiliated Capital Corp.,* ____U.S.____, 105 S. Ct. 1164, 84 L.Ed.2d 316 (1984). In *Greenwood Utilities Commission v. Mississippi Power Co.,* 751 F.2d 1484 (5th Cir. 1985), we recently held that *Noerr-Pennington* extends to situations where the government enters into a contractual relationship with a private entity, at least in situations "where the government engages in a policy decision and at the same time acts as a participant in the marketplace." *Id.* at 1505 (footnote omitted). We expressly rejected the notion that *Noerr-Pennington's* first amendment and statutory roots are not sympathetic to such agreements, even if they can be properly characterized as essentially "commercial." *Id.* at 1504-06; *cf. Mid-Texas Communications Systems, Inc. v. AT & T,* 615 F.2d 1372 1382-84 (5th Cir.), *cert. denied sub nom. Woodlands Telecommunications Corp. v. Southwestern Bell Telephone Co.,* 449 U.S. 912, 101 S. Ct. 286, 66 L.Ed.2d 140 (1980). Viewing the record in the light most favorable to appellants, the most that can be said is that Yellow secured from the City an exclusive concession whose anticompetitive effects stem primarily from a valid municipal, and vicariously state, policy. It would be anomalous to hold on the one hand that government can contract with private entities to effectuate valid, albeit anticompetitive, policies, while holding on the other hand that private entities cannot petition government to participate in the public endeavor.

There is no such case as *Parker v. Noerr-Pennington.*[10] In more than one sense Yellow was the vehicle through which the city implemented its vision of ground transportation at Intercontinental. If "the basic principle of *Noerr-Pennington* [is] that it is lawful to petition the government for anticompetitive action," *Greenwood Utilities,* 751 F.2d at 1506, then the federal antitrust laws cannot meter Yellow's conduct in this case. *See generally* 1 P. Areeda & D. Turner, *supra* note 9, ¶ 206d3.

The judgment of the district court is

AFFIRMED.

10. As the facts of this case suggest, the *Parker* and *Noerr-Pennington* immunities are somewhat interrelated. We need not consider, however, whether the private appellee would have prevailed with equal ease on summary judgment if the City had not been exempt under *Parker*. In large part, the two doctrines remain mutually independent both in origin and in application.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-2705

D.C. Docket No. CA-H79-2285 c/w
CA-80-1630-H

INDEPENDENT TAXICAB DRIVER'S
EMPLOYEES, ET AL.,
Plaintiffs-Appellants,

v.

GREATER HOUSTON TRANSPORTATION
COMPANY, ETC., ET AL.,
Defendants-Appellees.

* * * * * * *

ARROW NORTHWEST INC., ET AL.,
Plaintiffs-Appellants,

v.

GREATER HOUSTON TRANSPORTATION
COMPANY, ETC., ET AL.,
Defendants-Appellees.

Appeals from the United States District Court for the
Southern District of Texas

(Filed June 19, 1985)

Before GOLDBERG, JOHNSON, and DAVIS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and ajdudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

May 17, 1985

ISSUED AS MANDATE: June 12, 1985

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-79-2285

INDEPENDENT TAXICAB DRIVERS' EMPLOYEES, ROBERT BURNS, LOUISE F. WALKER, JOHN JENKINS, WINSTON JONES and O. D. SIMPSON

v.

GREATER HOUSTON TRANSPORTATION COMPANY d/b/a YELLOW CAB COMPANY and CITY OF HOUSTON

Consolidated With

CIVIL ACTION NO. H-80-1630

ARROW NORTHWEST, INC., a Texas Corporation, JIM ANDERSON, SANDRA H. ARNOLD, ERWIN J. SUSMAN, CAROL ANDERSON, MARGO A. RUSS, MATT CLASEN, JOHN WILLIAM ALSUP, MARGARET ALSUP, J. GRADY ORR, WENDEL M. RUSS, J. F. (Pepe) BACHOR, ELLIS C. FANCHER, ROBERT C. GREEN and KATHRYN JACOBS

v.

GREATER HOUSTON TRANSPORTATION COMPANY d/b/a YELLOW CAB COMPANY and THE CITY OF HOUSTON

(Filed November 9, 1983)

MEMORANDUM AND ORDER

This lawsuit arises out of a concession agreement between the two Defendants ("City" and "Yellow Cab")

which grants Yellow Cab the right to pick up passengers and baggage at Houston's Intercontinental Airport. The Plaintiffs ("Drivers") are various taxicab drivers and corporations who challenge the contract on the bases that it violates the federal antitrust laws and deprives them of their civil rights. The Plaintiffs and Defendants have each moved for summary judgment. At a conference held on October 12, 1983, the parties agreed that the record is complete, at least as it pertains to the grounds urged by the parties in support of their various motions for summary judgment. While summary procedure should be used sparingly in antitrust litigation,[1] upon careful consideration of all the pleadings, briefs, motions and exhibits filed herein, this Court concludes that there are no genuine issues of material fact and that the Defendants have demonstrated their entitlement to judgment as a matter of law.

I. THE CITY'S EXEMPTION

The City argues that it is immune from the federal antitrust laws in this case by virtue of the so-called state action exemption doctrine first enunciated in *Parker v. Brown*, 317 U.S. 341 (1943).

The material facts stated most favorably to the Drivers are as follows. The City owns and operates Houston Intercontinental Airport. The opening of the airport in 1969 was accompanied by rather chaotic operating conditions, including an extreme paucity of taxicab service for passengers arriving at the airport late at night and in the early morning hours. In reaction to this state of affairs, the City enacted Sections 45-10.1

1. *Pollar v. Columbia Broadcasting Systems*, 368 U.S. 464 (1962).

and 45-10.2 of the Code of City Ordinances. These ordinances prohibited a taxicab from picking up passengers at the airport unless the taxi was operated under a concession agreement with the City. Pursuant to these Sections, the City entered into a concession agreement with Yellow Cab which, *inter alia,* compelled Yellow Cab to provide all-hours taxi service to the airport under dispatching conditions set by the City. (Whatever the effect of this agreement has ultimately proved to be, it was apparently undertaken by the City to assure safe, orderly and reliable service to arriving passengers.) The root of the Drivers' complaint is that this agreement unreasonably restrains their trade and infringes on certain fundamental rights. Many words have been expended by the parties over whether the agreement is exclusive,[2] but if the *Parker* exemption applies here, the exclusivity of the contract is not really material since *Parker,* where it applies, excuses anticompetitive activity, including exclusive contracts. We assume *arguendo* that the contract is exclusive. Further, some of the Drivers have been restrained from offering certain "personalized" services because these practices conflict with the provisions of the concession agreement which provide for a circumscribed and uniform method of dispatching taxis at the airport. It is possible to conclude that these actions *could* amount to a colorable antitrust claim if the City is not entitled to the *Parker* exemption.

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2. The contract was originally an exclusive one, although this fact does not appear from the face of the agreement. The agreement was amended in 1980 so as to *require* Yellow Cab to permit other licensed taxi drivers to subcontract with it and operate at the airport under the same terms and conditions imposed on Yellow Cab. The evidence does not clearly establish that any operator attempted to gain its own concession agreement and was denied the opportunity by the City nor that anyone was denied a position as subcontractor.

The Court denied previous motions for summary judgment on essentially the grounds re-urged here, noting that resolution of the *Parker* issue presented a legal question over which reasonable minds could differ. This conclusion was bottomed, in part, on the conflicting decisions in *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025 (N.D. Tex. 1978) and *Walker v. City of Houston*, No. 73-H-648 (S.D. Tex. 1976). In the former case, the Court held that the defendant cities had no *Parker* exemption under facts similar to those of the instant case. In the latter case, which is virtually identical to the instant suit, that Court found that *Parker* did apply because the City had exercised a "valid governmental function in regulating taxicab service from Houston Intercontinental Airport." *Walker, supra,* at 5-6.

In recent months, the law of *Parker* as it relates to municipalities has greatly developed so that the *Parker* issue is amenable to resolution at this time. First, in *Community Communications Co. v. City of Boulder, Colorado,* ____ U.S. ____, 102 S. Ct. 835 (1982), the Supreme Court re-examined the "state action" exemption as it relates to Cities and concluded that cities are exempt from the operation of the federal antitrust laws only when they act pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation. Further, *Boulder* held that a position of mere "neutrality" on the part of the state is insufficient to trigger the protections of *Parker* and its progeny. A number of subsequent circuit and district court opinions have applied the tests set forth in *Boulder*. These cases are very instructive and merit detailed attention here.

In *Pueblo Aircraft Service v. City of Pueblo, Colorado,* 679 F.2d 805 (10th Cir. 1982), the Court faced attacks on certain municipal actions similar to those presented in the instant case. The *Pueblo* court noted that the key inquiry under *Boulder* is whether the pertinent state law affirmatively grants an exemption from the operation of the federal antitrust laws. *Id.,* at 809. The Court concluded that the city was exempted by virtue of certain statutory language declaring that the acquisition of lands by the city for airport use is in furtherance of a public purpose and a public necessity. A municipality acting in its declared "governmental capacity" functions as an arm of the state for the public good, rather than on behalf of itself, and is therefore protected by *Parker* when it acts in furtherance of such a governmental function. *Id.,* at 810-811.

It is not necessary to have any active state supervision of a city in its performance of a traditional municipal function in order for the city to receive state action immunity from the antitrust laws. *Town of Hallie v. City of Eau Claire,* 700 F.2d 376 (7th Cir. 1983). Moreover, state "compulsion" is *not* a prerequisite for *Parker* immunity; any city acting pursuant to clearly articulated, affirmatively expressed state policy which evidences an intent by the legislature to displace competition with regulation—whether it be compelled, directed, authorized or in the form of a prohibition—is entitled to immunity because conduct pursuant to such a policy would constitute state action. *Id.,* at 381, 384-385. Hence an authorization by the legislature to regulate a certain activity or field of activities creates a state action exemption. *Accord, Gold Cross Ambulance v. City of Kansas City,* 705 F.2d 1005, 1014 (8th Cir. 1983).

A legislative intent to displace competition may be sufficiently established where the challenged restraint is a reasonable consequence of state-authorized municipal activity. *Scott v. City of Sioux City,* 1983-2 Trade Cases, ¶ 65,589 (N.D. Iowa 1983). The challenged restraint need not be a necessary consequence of the activity since the parameters of state authorization extend to all situations in which the municipal activities are reasonably within the ambit of a state statutory scheme. *Id.* In other words, where the state legislature has clearly authorized municipal supervision of a particular enterprise, a program which would otherwise be anticompetitive but which is designed to implement the authorized supervision is exempt from antitrust scrutiny. *See Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Area Solid Waste Agency,* 1983-1 Trade Cases ¶ 65,386 (S.D. Iowa 1982).

We must now apply the above authorities to Art. 46d-1 *et seq.,* Tex. Rev. Civ. Stat. Ann., the Texas Municipal Airports Act, which the Defendants argue is the basis for the *Parker* exemption in this case.[3] The official title of this Act states that it is:

> "An Act relating to aeronautics; . . . providing for acquisition, construction, maintenance, operation *and regulation* (emphasis added) by municipalities and counties of airports and air navigation facilities; . . . providing for the making of contracts, leases and other agreements by counties and municipalities for

3. The Defendants also urge Art. 1175 as a basis for finding a state action exemption here. *Boulder* has made it clear that "home rule" statutes which merely reflect legislative "neutrality" do not trigger *Parker.* It is not necessary for us to determine whether Art. 1175 falls within *Boulder* in light of our holding *infra* regarding Art. 46d-1 *et seq.* We expressly decline to decide this issue.

> operation and use privileges of airports and air navigation facilities; . . . (and) authorizing penalties for violations of municipal ordinances and regulations . . ." Acts 1947, 50th Leg., p. 183, Chap. 114.

Art. 46d-4 authorizes municipalities to enter into contracts and other arrangements conferring the privilege of supplying goods and services at airport facilities owned, leased or controlled by a municipality. Further, Art. 46d-4 authorizes municipalities to establish the terms, conditions, charges and fees for these privileges or services so long as they are reasonable and uniform for the same class of privilege or service and are established with due regard to the property and improvements used. Art. 46d-13 authorizes a municipality to enter into any contracts which are necessary to the execution of any of the powers and purposes provided for by the Act (Art. 46d-1 through 46d-22). Art. 46d-15 expressly declares, *inter alia,* that the exercise of any powers granted to municipalities by the Act are public and governmental functions, exercised for a public purpose and a public necessity.

When *Boulder, Pueblo, Gold Cross, Town of Hallie, Scott,* and *Central Iowa* are applied to the provisions of the Municipal Airport Act outlined above, it seems to be quite clear that the Act affirmatively authorizes regulation of services to city-owned airports in a manner consistent with the challenged actions in the case at bar. The challenged concession agreement is a reasonable consequence of the authorized regulatory activity. Further, the express declaration that the contracts provided for by Art. 46d-4 are governmental functions exercised for a public purpose establishes that the city is acting as an arm of the state when executing a program pursuant to

the Act. Hence the conclusion that the *Parker* exemption applies to this case is virtually ineluctable.

Woolen prevents us from resting on our conclusions at this point since we have not yet considered the impact of Art. 46d-7(c), formerly 46d-7(b), which provides:

> "No ordinance, resolution, rule, regulaton or order adopted by a municipality pursuant to this Act shall be inconsistent with, or contrary to, any Act of the Congress . . . or to any regulations promulgated or standards established pursuant thereto."

Woolen concluded that this provision acted to deny cities an antitrust exemption under the Act. For the reasons set forth below, this Court respectfully disagrees.

First, Art. 46d-7(c) must be viewed in the full context of the Act. In this regard, we note that Art. 46d-7 is entitled "Regulations and jurisdiction" and that section (b), which was added by the 1981 legislative session, sets forth the proper scope of municipal regulations. Section (b) and (c), when read together, make it fairly clear that the municipal regulations authorized by the Act are not to conflict with the extensive federal regulation of aeronautics and aviation. Second, the official title of the Act states that it pertains to aeronautics (generally) and that it specifically provides for regulation by municipalities of airport facilities. Third, the Court's opinion did not address the meaning of Art. 46d-15 which, as noted above, clearly declares that the exercise of any powers granted by the Act are public and governmental in nature. The only logical way to reconcile Articles 46d-7 and 46d-15 is to conclude that the legislature intended municipal acts which are undertaken pursuant to the Act to be

"state actions," but that any such regulations undertaken by cities must stop short of encroaching on aviational matters regulated by the federal government. Hence we conclude that the state has sufficiently expressed a clear and affirmative policy to displace competition with regulation in the provision of any services to a municipal airport, and that the challenged activity is a reasonable consequence of this regulatory activity.[4] The City is shielded from antitrust liability by the *Parker* doctrine.

II. YELLOW CAB'S ANTITRUST LIABILITY

Yellow Cab has moved for summary judgment based primarily on the so-called *Noerr-Pennington* doctrine. Under this doctrine, efforts to influence certain governmental action do not violate antitrust law regardless of their anticompetitive effect. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S.

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4. Our conclusion is supported in part by decisions of the Texas state courts. The Texas Supreme Court has held that Art. 46d-15 is effective to negate any proprietary duty on the part of cities and to establish governmental immunity in the operation of a municipal airport. *City of Corsicana v. Wren*, 317 S.W.2d 516 (Tex. 1958). Subsequent opinions have reinforced *Corsicana* by holding that the maintenance and operation of municipal airports is entirely a governmental function which shields cities from liability except to the extent such immunity is waived by the Texas Tort Claims Act. *Bragg v. City of Dallas*, 605 S.W.2d 669 (Tex. Civ. App.—Dallas 1980), mot. for reh. overruled 608 S.W.2d 696; *Schultz v. City of Houston*, 551 S.W.2d 494 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ); *Flippen v. City of Beaumont*, 525 S.W.2d 285 (Tex. Civ. App.—Beaumont 1975, no writ). While these cases deal primarily with tort liability, the principles underlying the extension of the state's sovereign immunity to cities is persuasive support for the conclusion that an action declared to be governmental in nature should be deemed to be an action undertaken on behalf of the state itself. This is especially so in light of the decision of the Tenth Circuit in *Pueblo, supra*.

657 (1965). The proper application of *Noerr-Pennington* immunity presupposes *Parker* immunity. This is necessarily so because where the governmental action which a party seeks to influence is a valid state action, then it follows that attempts to influence that action are also exempt under First Amendment principles. *See In re Airport Car Rental Antitrust Litigation,* 474 F.Supp. 1072, 1090-1091 and cases cited therein (N.D. Cal. 1979).

Many courts have limited *Noerr-Pennington* immunity to situations where a party has sought to influence officials acting in "governmental" capacities as opposed to decision-making which is "proprietary" or "commercial" in nature. *Hill Aircraft & Leasing Corp. v. Fulton County, Ga.,* 561 F.Supp. 667, 675 (N.D. Ga. 1982). Under this test, we must conclude that Yellow Cab's activities in this case sought to influence governmental actions by the City since the concession agreement at issue flowed directly from the exercise of a governmental, public function. Hence, Yellow Cab is immune from antitrust liability here under the *Noerr-Pennington* doctrine. This result is consonant with recent opinions in similar cases. *Coastal States Marketing, Inc. v. Hunt,* 694 F.2d 1358 (5th Cir. 1983); *In re Airport Car Rental Litigation,* 693 F.2d 84 (9th Cir. 1983); *Hopkinsville Cable TV v. Pennyroyal Cablevision,* 1983-1 Trade Cases ¶ 62,251 (W.D. Ky. 1983). Since we have determined that the City's conduct here was lawful, it would be an anomalous restriction on Yellow Cab to hold that it acted illegally. *See E.W. Wiggins Airways, Inc. v. Massachusetts Port Authority,* 362 F.2d 52, 56 (1st Cir.), cert. denied 385 U.S. 947 (1966). Therefore this Court holds that Yellow Cab is entitled to judgment as a matter of law.

III. THE CIVIL RIGHTS CLAIMS

The Drivers claim that the challenged activities have deprived them of their civil rights. This position is primarily predicated on alleged violations of the Commerce Clause and the Equal Protection Clause.

The Drivers contend that the challenged ordinances and agreement unduly burden interstate commerce. The challenged activity must be upheld, however, if it regulates in an even-handed manner to effectuate a legitimate local public interest and if its effects on interstate commerce are only incidental. *Edgar v. Mite Corp.*, ____U.S.____, 102 S. Ct. 2629, 2640 (1982); *Great A. & P. Tea Co. v. Cottrell,* 424 U.S. 366 (1976). This Court agrees with Judge Singleton (see *Walker v. City of Houston, supra,* at 4), who held that the challenged activities in this case do not violate the federal commerce power.

Plaintiffs assert that the activities at issue violate equal protection by virtue of the City's "discrimination" in favor of Yellow Cab. This contention may be disposed of summarily. Since the taxicab services in question obviously do not involve any fundamental interests or any suspect classifications, the City's actions can be vindicated by a showing that the ordinances have an underlying reasonable basis. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973). The record demonstrates that the challenged activities have a reasonable basis and therefore this claim by the Drivers must fail.

Finally, the Drivers attack the criminal enforcement of the ordinances at issue, under 42 U.S.C. § 1983. To the extent this argument may have any vitality at all in light of our other conclusions in this opinion, this attack is foreclosed by the doctrine of *Younger v. Harris,* 401

U.S. 37 (1971) and its progeny. This Court can discern no other colorable claim under § 1983 in this case. Therefore the Defendants are entitled to summary judgment on the civil rights claims.

IV. PENDENT CLAIMS

Having maneuvered through the thickets of antitrust law and having disposed of the civil rights claims, this Court is yet confronted with various state-law claims. Since the federally-based claims have been destroyed via summary judgment, this Court exercises its discretion to dismiss these pendent state claims without prejudice. *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966); *Tinker v. DeMaria Porsche-Audi, Inc.,* 632 F.2d 520 (5th Cir. 1980).

V. CONCLUSION

This Court holds that entry of summary judgment in favor of the Defendants is proper. Our holding is based on the *Parker* and *Noerr-Pennington* doctrines, and on the entitlement of the Defendants to judgment as a matter of law regarding the civil rights claims. The remaining state-law claims are dismissed without prejudice.

Accordingly, the motions for summary judgment of the Defendants are hereby GRANTED, the motions for summary judgment of the Plaintiffs are DENIED, this cause is DISMISSED, and all remaining motions in the case are hereby mooted.

DONE in Houston, Texas, this 9th day of November, 1983.

/s/ JAMES DeANDA
James DeAnda
United States District Judge

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-79-2285

INDEPENDENT TAXICAB DRIVERS' EMPLOYEES, ROBERT BURNS, LOUISE F. WALKER, JOHN JENKINS, WINSTON JONES and O. D. SIMPSON

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v.

GREATER HOUSTON TRANSPORTATION COMPANY d/b/a YELLOW CAB COMPANY and THE CITY OF HOUSTON

(Filed November 9, 1983)

FINAL JUDGMENT

In accordance with the Court's Memorandum Opinion filed in the above-referenced action on this date, judgment

is hereby entered for the DEFENDANTS City of Houston and Greater Houston Transportation Company d/b/a Yellow Cab Company.

All taxable costs are assessed against the Plaintiffs, Independent Taxicab Drivers' Employees, Robert Burns, Louise F. Walker, John Jenkins, Winston Jones, O. D. Simpson, Arrow Northwest, Inc., a Texas Corporation; Jim Anderson, Sandra H. Arnold, Erwin J. Susman, Carol Anderson, Margo A. Russ, Matt Clasen, John William Alsup, Margaret Alsup, J. Grady Orr, Wendel M. Russ, J .F. (Pepe) Bachor, Ellis C. Fancher, Robert C. Green and Kathryn Jacobs.

This is a Final Judgment.

DONE in Houston, Texas, this 9th day of November, 1983.

/s/ JAMES DeANDA
James DeAnda
United States District Judge

APPENDIX C

TEXAS REVISED CIVIL STATUTES

Art. 46d-1. Definitions

As used in this Act,[1] unless the text otherwise requires:

(a) "Airport" means any area of land or water which is used, or intended for use, for the landing and take-off of aircraft, and any appurtenant areas which are used, or intended for use, for airport buildings or other airport facilities or right-of-ways, together with all airport buildings and facilities located thereon.

(b) "Air navigation facility" means any facility—other than one owned and operated by the United States—used in, available for use in or designed for use in, aid of air navigation, including any structures, mechanism, lights, beacons, markers, communicating systems, or other instrumentalities, or devices used or useful as an aid, or constituting an advantage or convenience, to the safe taking-off, navigation, and landing of aircraft, or the safe and efficient operation or maintenance of an airport, and any combination of any or all of such facilities.

(c) "Airport hazard" means any structure, object of natural growth, or use of land which obstructs the airspace required for the flight of aircraft in landing or taking-off at an airport or is otherwise hazardous to such landing or taking-off of aircraft.

(d) "Municipality" means any county, or any incorporated city, village or town of this State. "Municipal" means pertaining to a municipality as herein defined.

(e) "Person" means any individual, firm, partnership, corporation, company, association, joint stock association,

or body politic; and includes any trustee, receiver, assignee or other similar representative thereof.

Acts 1947, 50th Leg., p. 184, ch. 114, § 1.

1. Articles 46d-1 to 46d-22.

Art. 46d-2. General powers of municipalities in the establishment, acquisition, operation and maintenance of airports and air navigation facilities

(a) Establishment, Operation, Land Acquisition. Every municipality is authorized, out of any appropriations or other moneys made available for such purposes, to plan, establish, develop, construct, enlarge, improve, maintain, equip, operate, regulate, protect and police airports and air navigation facilities, either within or without the territorial limits of such municipality and within or without the territorial boundaries of this State, including the construction, installation, equipment, maintenance and operation at such airports of buildings and other facilities for the servicing of aircraft or for the comfort and accommodation of air travelers, and the purchase and sale of supplies, goods and commodities as an incident to the operation of its airport properties. For such purposes the municipality may use any available property that it may now or hereafter own or control and may, by purchase, gift, devise, lease, eminent domain proceedings or otherwise, acquire property, real or personal, or any interest therein including easements in airport hazards or land outside the boundaries of an airport or airport site, as are necessary to permit safe and efficient operation of the airport or to permit the removal, elimination, ob-

struction—marking of obstruction—lighting of airport hazards or to prevent the establishment of airport hazards.

(b) Acquisition of Existing Airports. The municipality may by purchase, gift, devise, lease, proceedings or otherwise, acquire existing airports and air navigation facilities, provided however it shall not acquire or take over any airport or air navigation facility owned or controlled by another municipality or public agency of this or any other State without the consent of such municipality or public agency.

(c) Establishment of Airports on Public Waters and reclaimed Lands. For the purposes of this Act,[1] a municipality may establish or acquire and maintain, within or bordering upon the territorial limits of the municipality, airports in, over and upon, any public waters of this State, any submerged lands under such public waters, and any artificial or reclaimed lands which before the artificial making or reclamation thereof constituted a portion of the submerged lands under such public waters; and may construct and maintain terminal buildings, landing floats, causeways, roadways and bridges for approaches to or connecting with any such airport, and landing floats and breakwaters for the protection thereof.

(d) Limitation on Design and Operation of Air Navigation facilities. All air navigation facilities established or operated by municipalities shall be supplementary to and coordinated in design and operation with those established and operated by the Federal and State governments.

Acts 1947, 50th Leg., p. 184, ch. 114, § 2.

1. Articles 46d-1 to 46d-22.

Art. 46d-3. Disposal of airport property

Except as may be limited by the terms and conditions of any grant, loan, or agreement pursuant to Section 12 of this Act,[1] every municipality may by sale, lease or otherwise, dispose of any airport, air navigation facility or other property, or portion thereof or interest therein, acquired pursuant to this Act.[2] Such disposal by sale, lease or otherwise, shall be in accordance with the laws of this State, or provisions of the charter of the municipality, governing the disposition of other property of the municipality, except that in the case of disposal to another municipality or agency of the State or Federal government for aeronautical purposes incident thereto, the sale, lease, or other disposal may be effected in such manner and upon such terms as the governing body of the municipality may deem in the best interest of the municipality.

Acts 1947, 50th Leg., p. 185, ch. 114, § 3.

1. Article 46d-12.

2. Articles 46d-1 to 46d-22.

Art. 46d-4. Operation and use privileges

(a) Under Municipal Operation. In operating an airport or air navigation facility owned, leased or controlled by a municipality, such municipality may, except as may be limited by the terms and conditions of any grant, loan, or agreement pursuant to Section 12 of this Act,[1] enter into contracts, leases and other arrangements for a term not exceeding forty (40) years with any persons:

(1) granting the privilege of using or improving such

airport or air navigation facility or any portion or facility thereof, or space therein for commercial purposes;

(2) conferring the privilege of supplying goods, commodities, things, services or facilities at such airport or air navigation facility; or

(3) making available services to be furnished by the municipality or its agents at such airport or air navigation facility.

In each case the municipality may establish the terms and conditions and fix the charges, rentals or fees for the privileges or services, which shall be reasonable and uniform for the same class of privilege or service and shall be established with due regard to the property and improvements used and the expenses of operation to the municipality.

(b) Under other Operation. Except as may be limited by the terms and conditions of any grant, loan, or agreement pursuant to Section 12 of this Act, a municipality may by contract, lease or other arrangement, upon a consideration fixed by it, grant to any qualified person for a term not to exceed forty (40) years the privilege of operating, as agent of the municipality or otherwise, any airport owned or controlled by the municipality; provided that no such person shall be granted any authority to operate the airport other than a public airport or to enter into any contracts, leases or other agreements in connection with the operation of the airport which the municipality might not have undertaken under Subsection (a) of this Section.

Acts 1947, 50th Leg., p. 185, ch. 114, § 4.

1. Article 46d-12.

Art. 46d-5. Liens

To enforce the payment of any charges for repairs or improvements to or storage or care of, any personal property made or furnished by the municipality or its agents in connection with the operation of an airport or air navigation facility owned or operated by the municipality, the municipality shall have liens on such property, which shall be enforceable by the municipality as provided by law.

Acts 1947, 50th Leg., p. 186, ch. 114, § 5.

Art. 46d-6. Delegation of authority to airport officer or board

Any authority vested by this Act[1] in a municipality or in the governing body thereof, for the planning, establishment, development, construction, enlargement, improvement, maintenance, equipment, operation, regulation, protection and policing of airports or other air navigation facilities established, owned or controlled, or to be established, owned or controlled by the municipality may be vested by resolution of the governing body of the municipality in an officer or board or other municipal agency whose powers and duties shall be prescribed in the resolution; provided however, that the expense of such planning, establishment, development, construction, enlargement, improvement, maintenance, equipment, operation, regulation, protection and policing shall be a responsibility of the municipality.

Acts 1947, 50th Leg., p. 186, ch. 114, § 6.

1. Articles 46d-1 to 46d-22.

Art. 46d-7. Regulations and jurisdiction

(a) Scope. A municipality, which has established or acquired or which may hereafter establish or acquire an airport or air navigation facility, is authorized to adopt, amend and repeal such reasonable ordinances, resolutions, rules, regulations and orders as it shall deem necessary for the management, government and use of such airport or air navigation facility under its control, whether situated within or without the territorial limits of the municipality. For the enforcement thereof, the municipality, may, by ordinance or resolution, as may by law be appropriate, appoint airport guards or police, with full police powers, and fix penalties, within the limits prescribed by law, for the violation of the aforesaid ordinances, resolutions, rules, regulations and orders. Said penalties shall be enforced in the same manner in which penalties prescribed by other ordinances, or resolutions of the municipality are enforced. To the extent that an airport or other air navigation facility controlled and operated by a municipality is located outside the territorial limits of the municipality, it shall, subject to Federal and State laws, rules and regulations, be under the jurisdiction and control of the municipality controlling or operating it, and no other municipality shall have any authority to charge or exact a license fee or occupation tax for operations thereon.

(b) Conformity to Federal and State law. No ordinance, resolution, rule, regulation or order adopted by a municipality pursuant to this Act[1] shall be inconsistent with, or contrary to, any Act of the Congress of the United States or laws of this State, or to any regulations promulgated or standards established pursuant thereto.

Acts 1947, 50th Leg., p. 186, ch. 114, § 7.

1. Articles 46d-1 to 46d-22.

Art. 46d-7. Regulations and jurisdiction

(a) In this section "airport hazard area" means any area of land or water upon which an airport hazard might be established if not prevented as provided in this Act.

(b) Scope. A municipality, which has established or acquired or which may hereafter establish or acquire an airport or air navigation facility, is authorized to adopt, amend and repeal such reasonable ordinances, resolutions, rules, regulations and orders as it shall deem necessary for the management, government and use of such airport or air navigation facility under its control or an airport hazard area relating to the airport, whether situated within or without the territorial limits of the municipality. For the enforcement thereof, the municipality, may, by ordinance or resolution, as may by law be appropriate, appoint airport guards or police, with full police powers, and fix penalties, within the limits prescribed by law, for the violation of the aforesaid ordinances, resolutions, rules, regulations and orders. Said penalties shall be enforced in the same manner in which penalties prescribed by other ordinances, or resolutions of the municipality are enforced. To the extent that an airport, air navigation facility, or airport hazard area controlled and operated by a municipality is located outside the territorial limits of the municipality, it shall, subject to Federal and State laws, rules and regulations, be under the jurisdiction and control of the municipality controlling or operating it, and no other municipality shall have any authority to charge or exact a license fee or occupation tax for operations thereon.

(c) Conformity to Federal and State Law: No ordinance, resolution, rule, regulation or order adopted by a municipality pursuant to this Act shall be inconsistent

with, or contrary to, any Act of the Congress of the United States or laws of this State, or to any regulations promulgated or standards established pursuant thereto.

Amended by Acts 1981, 67th Leg., p. 851, ch. 300, § 1, eff. Aug. 31, 1981.

Art. 46d-8. Taxation

In addition to and exclusive of any taxes which may be levied for the interest and sinking fund of any bonds, notes or time warrants issued under authority of this Act,[1] or any other Act of the Legislature authorizing municipalities to issue such bonds, notes, or warrants for airport purposes, the governing body of any municipality may and is hereby empowered to levy and collect a special tax not to exceed for any one year five cents (5¢) on each One Hundred Dollars ($100) for the purpose of improving, operating, maintaining and conducting an airport or air navigation facility, or for any other purpose falling within the purview of this Act; provided, however, that nothing in this Act shall be construed as authorizing any municipality to exceed the limits of indebtedness placed upon it under the Constitution.

Acts 1947, 50th Leg., p. 186, ch. 114, § 8.

1. Articles 46d-1 to 46d-22.

Art. 46d-9. Bond issues—financing acquisition costs and improvements

The cost of planning and acquiring, establishing, developing, constructing, enlarging, improving, or equipping, an airport or air navigation facility, or the site therefor, including buildings and other facilities incidental to the operation thereof, and the acquisition or elimination

of airport hazards, may be paid for wholly or partly from the proceeds of the sale of bonds of the municipality, as the governing body of the municipality shall determine. For such purposes a municipality may issue general or special obligation bonds, revenue bonds or other forms of bonds, secured or unsecured, including refunding bonds, and levy taxes to provide for the interest and sinking funds of any bonds so issued, the authority hereby given for the issuance of such bonds and levy and collection of such taxes to be exercised in accordance with the provisions of Title 22 of the Revised Civil Statutes of Texas, 1925, Article 701 et seq., and Acts amendatory thereof or supplementary thereto. All bonds issued by a municipality pursuant to this Act[1] which are payable, as to principal and interest, solely from the revenues of an airport or air navigation facility shall so state on their face. In any suit, action or proceeding involving the security, or the validity or enforceability, of any bonds issued by a municipality, which bonds state on their face that they were issued pursuant to the provisions of this Act and for a purpose or purposes authorized to be accomplished by this Act, such bonds shall be conclusively deemed to have been issued pursuant to this Act for such purpose or purposes.

Acts 1947, 50th Leg., p. 187, ch. 114, § 9.

1. Articles 46d-1 to 46d-22.

Art. 46d-10. Validation of prior acquisitions, actions and bond issues

Any acquisition of property heretofore made, within or without the limits of any municipality of the State, for the purposes authorized by this Act,[1] and any other action

heretofore taken by a municipality in the furtherance of such purposes, including but not limited to the making of appropriations, the expendtiure of money, the incurring of debts, the acceptance and disbursement of Federal, State or other grants or loans, the issuance of payment and bonds, the execution of leases and contracts, which acquisition or action would have been authorized had this Act been in effect at the time of such acquisition or action, is hereby ratified and made valid. All bonds heretofore issued in furtherance of purposes authorized by this Act and actions ratified by this Section are confirmed as legal obligations of the municipality, and, without prejudice to the general powers granted to the municipality by this Act, such municipality is hereby authorized to issue further bonds for such purposes up to the limit fixed in the original authorization therefor, which bonds shall be legal obligations in accordance with their terms.

Acts 1947, 50th Leg., p. 187, ch. 114, § 10.

1. Articles 46d-1 to 46d-22.

Art. 46d-11. Application of airport revenues and sale proceeds

The revenues obtained by a municipality from the ownership, control or operation of any airport or air navigation facility, including proceeds from the sale of any airport or portion thereof or air navigation facility property, shall be deposited in a special fund to be designated the "_____ Airport Fund," which revenues shall be appropriated solely to, and used by the municipality for, the purposes authorized by this Act.[1]

Acts 1947, 50th Leg., p. 187, ch. 114, § 11.

1. Articles 46d-1 to 46d-22.

Art. 46d-12. Federal and state-aid

(a) Acceptance Authorized, Conditions. Every municipality is authorized to accept, receive, receipt for, disburse and expand Federal and State moneys and other moneys, public or private, made available by grant or loan or both to accomplish in whole or in part, any of the purposes of this Act.[1] All Federal moneys accepted under this Section shall be accepted and expended by the municipality upon such terms and conditions as are prescribed by the United States and as are consistent with State law; and all State moneys accepted under this Section shall be accepted and expended by the municipality upon such terms and conditions as are prescribed by the State. Unless otherwise prescribed by the agency from which such moneys were received, the chief financial officer of the municipality shall, on its behalf deposit all moneys received pursuant to this Section and shall keep them, in separate funds designated according to the purposes for which the moneys were made available, in trust for such purposes.

(b) Aeronautics Commission as Agent. A municipality is authorized to designate the Texas Aeronautics Commission as its agent to accept, receive, receipt for and disburse Federal and State moneys, and other moneys, public or private, made available by grant or loan or both to accomplish, in whole or in part, any of the purposes of this Act; and to designate the said Commission as its agent in contracting for and supervising the planning, acquisition, development, construction, improvement, maintenance, equipment or operation of any airport or other air navigation facility. All contracts made, let or awarded by the Texas Aeronautics Commission acting as agent of a

municipality under authority of this Section, shall be made, let or awarded pursuant to the laws governing the making of contracts by or on behalf of the State. Such municipality may enter into an agreement with the said Aeronautics Commission prescribing the terms and conditions of the agency in accordance with such terms and conditions as are prescribed by the United States, if Federal money is involved, and in accordance with the applicable laws of this State. All Federal moneys accepted under this Section by the Texas Aeronautics Commission shall be accepted and transferred or expended by said Commission upon such terms and conditions as are prescribed by the United States. All moneys received by the Texas Aeronautics Commission pursuant to this Subsection shall be deposited in the State Treasury, and unless otherwise prescribed by the agency from which such moneys were received, shall be kept in separate funds designated according to the purposes for which the moneys were made available, and held by the State in trust for such purposes.

Acts 1947, 50th Leg., p. 188, ch. 114, § 12.

1. Articles 46d-1 to 46d-22.

Art. 46d-13. Contracts

A municipality may enter into any contracts necessary to the execution of the powers granted it, and for the purposes provided by this Act.[1]

Acts 1947, 50th Leg., p. 188, ch. 114, § 13.

1. Articles 46d-1 to 46d-22.

Art. 46d-14. Joint operations

(a) Authorization. For the purposes of this Section, unless otherwise qualified, the term "public agency" includes manicipality, as defined in this Act,[1] any agency of the State government and of the United States, and any municipality, political subdivision and agency of another State; and the term "governing body" means the governing body of a county or municipality, and the head of the agency if the public agency is other than a county or municipality. All powers, privileges and authority granted to any municipality by this Act may be exercised and enjoyed jointly with any public agency of any other State or of the United States to the extent that the laws of such other State or of the United States permit such joint exercise or enjoyment. If not otherwise authorized by law, any agency of the State government when acting jointly with any municipality, may exercise and enjoy all of the powers, privileges and authority conferred by this Act upon a municipality.

(b) Agreement. Any two (2) or more agencies may enter into agreements with each other for joint action pursuant to the provisions of this Act and any two (2) or more municipalities are specially authorized to make such agreement or agreements as they may deem necessary for the joint acquisition and operation of airports and air navigation facilities. Concurrent action by ordinance, resolution or otherwise of the governing bodies of the participating public agencies shall constitute joint action. Each such agreement shall specify its duration, the proportionate interest which each public agency shall have in the property, facilities and privileges involved, the proportion to be borne by each public agency of

preliminary costs and costs of acquisition, establishment, construction, enlargement, improvement, and equipment of the airport or air navigation facility, the proportion of the expenses of maintenance, operation, regulation and protection thereof to be borne by each and such other terms as are required by the provisions of this Section. The agreement may also provide for: amendments thereof, and conditions and methods of termination of the agreement; the disposal of all or any of the property, facilities and privileges jointly owned, prior to or upon said property, facilities and privileges, or any part thereof, ceasing to be used for the purposes provided in this Act, or upon termination of the agreement; the distribution of the proceeds received upon any such disposal, and of any funds or other property jointly owned and undisposed of; the assumption or payment of any indebtedness arising from the joint venture which remains unpaid upon the disposal of all assets or upon a termination of the agreement; and such other provisions as may be necessary or convenient.

(c) Joint Board. Public agencies acting jointly pursuant to this Section shall create a joint board which shall consist of members appointed by the governing body of each participating public agency. The number to be appointed, their term and compensation, if any, shall be provided for in the joint agreement. Each such joint board shall organize, select officers for terms to be fixed by the agreement, and adopt and amend from time to time rules for its own procedure. The joint board shall have power to plan, acquire, establish, develop, construct, enlarge, improve, maintain, equip, operate, regulate, protect and police any airport or air navigation facility or airport hazard to be jointly acquired, controlled and

operated, and such board may exercise on behalf of its constituent public agencies all the powers of each with respect to such airport, air navigation facility or airport hazard, subject to the limitations of Subsection (d) of this Section.

(d) Limitations on Joint Board.

(1) Expenditures. The total expenditures to be made by the joint board for any purpose in any calendar year shall be determined by a budget approved by the governing bodies of its constituent public agencies on or before the preceding December 1st.

(2) Acquisitions Beyond Sums Allotted. No airport, air navigation facility, airport hazard, or real or personal property, the cost of which is in excess of sums therefor fixed by the joint agreement or allotted in the annual budget, may be acquired by the joint board without the approval of the governing bodies of its constituent public agencies.

(3) Eminent Domain. Eminent domain proceedings under this Section may be instituted only by authority of the governing bodies of the constituent public agencies of the joint board. If so authorized, such proceedings shall be instituted in the names of the constituent public agencies jointly, and the property so acquired shall be held by said public agencies as tenants in common until conveyed by them to the joint board.

(4) Disposal of Real Property. The joint board shall not dispose of any airport, air navigation facility or real property under its jurisdiction except with the consent of the governing bodies of its constituent public agencies, provided that the joint board may, without such consent,

enter into the contract, lease or other arrangements contemplated by Section 4 of this Act.[2]

(5) Police Regulations. Any resolutions, rules, regulations or orders of the joint board dealing with subjects authorized by Section 7 of this Act[3] shall become effective only upon approval of the governing bodies of the constituent public agencies provided that upon such approval, the resolutions, rules, regulations or orders of the joint board shall have the same force and effect in the territories or jurisdictions involved as the ordinances, resolutions, rules, regulations or orders of each public agency would have in its own territory or jurisdiction.

(e) Joint Fund. For the purpose of providing a joint board with moneys for the necessary expenditures in carrying out the provisions of this Section, a joint fund shall be created and maintained, into which shall be deposited the share of each of the constituent public agencies as provided by the joint agreement. Each of the constituent public agencies shall provide its share of the fund from sources available to each. Any Federal, State or other contributions or loans, and the revenues obtained from the joint ownership, control and operation of any airport or air navigation facility under the jurisdiction of the joint board shall be paid into the joint fund. Disbursements from such fund shall be made by order of the board, subject to the limitations prescribed in Subsection (d) of this Section.

Acts 1947, 50th Leg., p. 188, ch. 114, § 14.

1. Articles 46d-1 to 46d-22.
2. Article 46d-4.
3. Article 46d-7.

Art. 46d-14. Joint operations

(a) Authorization. For the purposes of this Section, unless otherwise qualified, the term "public agency" includes municipality, as defined in this Act, any agency of the State government and of the United States, and any municipality, political subdivision and agency of another State; and the term "governing body" means the governing body of a county or municipality, and the head of the agency if the public agency is other than a county or municipality, and the term "airport hazard area" means any area of land or water upon which an airport hazard might be established if not prevented as provided in this Act. All powers, privileges and authority granted to any municipality by this Act may be exercised and enjoyed jointly with any public agency of any other State or of the United States to the extent that the laws of such other State or of the United States permit such joint exercise or enjoyment. If not otherwise authorized by law, any agency of the State government when acting jointly with any municipality, may exercise and enjoy all of the powers, privileges and authority conferred by this Act upon a municipality.

(b) Agreement. Any two (2) or more public agencies may enter into agreements with each other for joint action pursuant to the provisions of this Act and any two (2) or more municipalities are specially authorized to make such agreement or agreements as they may deem necessary for the joint acquisition and operation of airports, air navigation facilities, or airport hazard areas. Concurrent action by ordinance, resolution or otherwise of the governing bodies of the participating public agencies shall constitute joint action. Each such agreement shall

specify its duration, the proportionate interest which each public agency shall have in the property, facilities and privileges involved, the proportion to be borne by each public agency of preliminary costs and costs of acquisition, establishment, construction, enlargement, improvement, and equipment of the airport, air navigation facility, or airport hazard area, the proportion of the expenses of maintenance, operation, regulation and protection thereof to be borne by each and such other terms as are required by the provisions of this Section. The agreement may also provide for: amendments thereof, and conditions and methods of termination of the agreement; the disposal of all or any of the property, facilities and privileges jointly owned, prior to or upon said property, facilities and privileges, or any part thereof, ceasing to be used for the purposes provided in this Act, or upon termination of the agreement; the distribution of the proceeds received upon any such disposal, and of any funds or other property jointly owned and undisposed of; the assumption or payment of any indebtedness arising from the joint venture which remains unpaid upon the disposal of all assets or upon a termination of the agreement; and such other provisions as may be necessary or convenient.

(c) Joint Board. Public agencies acting jointly pursuant to this Section shall create a joint board which shall consist of members appointed by the governing body of each participating public agency. The number to be appointed, their term and compensation, if any, shall be provided for in the joint agreement. Each such joint board shall organize, select officers for terms to be fixed by the agreement, and adopt and amend from time to time rules for its own procedure. The joint board shall

have power to plan, acquire, establish, develop, construct, enlarge, improve, maintain, equip, operate, regulate, protect and police any airport, air navigation facility, or airport hazard area to be jointly acquired, controlled and operated, and such board may exercise on behalf of its constituent public agencies all the powers of each with respect to such airport, air navigation facility or airport hazard area, subject to the limitations of Subsection (d) of this Section.

* * *

Subsecs. (a) to (c) amended by Acts 1981, 67th Leg., p. 852, ch. 300, § 2, eff. Aug. 31, 1981.

Art. 46d-15. Public purpose, county and munipical purpose

The acquisition of any land or interest therein pursuant to this Act[1] the planning, acquisition, establishment, development, construction, improvement, maintenance, equipment, operation, regulation, protection and policing of airports and air navigation facilities, including the acquisition or elimination of airport hazards, and the exercise of any other powers herein granted to municipalities and other public agencies to be severally or jointly exercised, are hereby declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity; and in the case of any county, are declared to be county functions and purposes as well as public and governmental; and in the case of any municipality other than a county, are declared to be municipal functions and purposes as well as public and governmental. All land and other property and privileges

acquired and used by or on behalf of any municipality or other public agency in the manner and for the purposes enumerated in this Act shall and are hereby declared to be acquired and used for public and governmental purposes and as a matter of public necessity, and, in the case of a county or municipality, for county or municipal purposes, respectively.

Acts 1947, 50th Leg., p. 190, ch. 114 § 15.

1. Articles 46d-1 to 46d-22.

Art. 46d-16. Airport property and income exempt from taxation

Any property in this State acquired by a municipality for airport purposes pursuant to the provisions of this Act,[1] and any income derived by such municipality from the ownership, operation or control thereof, shall be exempt from taxation to the same extent as other property used for public purposes. Any municipality is authorized to exempt from municipal taxation any property, acquired within its boundaries by a public agency of another State for airport purposes, and any income derived from such property, to the extent that such other State authorizes similar exemptions from taxation to municipalities of this State.

Acts 1947, 50th Leg., p. 190, ch. 114, § 16.

1. Articles 46d-1 to 46d-22.

Art. 46d-17. Supplementary authority

In addition to the general and special powers conferred by this Act,[1] every municipality is authorized to exer-

cise such powers as are necessarily incidental to the exercise of such general and special powers.

Acts 1947, 50th Leg., p. 191, ch. 114, § 17.

1. Articles 46d-1 to 46d-22.

Art. 46d-18. Airport zoning

Nothing contained in this Act[1] shall be construed to limit any right, power or authority of a municipality to regulate airport hazards by zoning.

Acts 1947, 50th Leg., p. 191, ch. 114, § 18.

1. Articles 46d-1 to 46d-22.

Art. 46d-19. Interpretation and construction

This Act[1] shall be so interpreted and construed as to make uniform so far as possible laws and regulations of this State and other States and of the government of the United States having to do with the subject of municipal airports.

Acts 1947, 50th Leg., p. 191, ch. 114, § 19.

1. Articles 46d-1 to 46d-22.

Art. 46d-20. Severability

If any provision of this Act[1] or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the provisions or application of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Acts 1947, 50th Leg., p. 191, ch. 114, § 20.

1. Articles 46d-1 to 46d-22.

Art. 46d-21. Cumulative

This Act[1] is cumulative of and in addition to all laws of the State of Texas on this subject.

Acts 1947, 50th Leg., p. 191, ch. 114, § 21.

1. Articles 46d-1 to 46d-22.

Art. 46d-22. Short title.

This Act[1] may be cited as the "Municipal Airports Act."

Acts 1947, 50th Leg., p. 191, ch. 114, § 22.

1. Articles 46d-1 to 46d-22.

APPENDIX D

TEXAS CONSTITUTION

Art. 1, § 26. Perpetuities and monopolies; primogeniture or entailments

Sec. 26. Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this State.

APPENDIX E

ARKANSAS CONSTITUTION

Art. 2, § 19. Perpetuities and monopolies.

Sec. 19. Perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed; nor shall any hereditory emoluments, privileges or honors ever be granted or conferred in this State.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

(2)

NO. 85-272

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ARROW NORTHWEST, INC., A TEXAS CORPORATION, JIM ANDERSON, SANDRA H. ARNOLD, ERWIN J. SUSMAN, CAROL ANDERSON, MARGO A. RUSS, MATT CLASEN, JOHN WILLIAM ALSUP, MARGARET ALSUP, J. GRADY ORR, WENDEL M. RUSS, J. F. (PEPE) BACHOR, ELLIS C. FANCHER, ROBERT C. GREEN AND KATHRYN JACOBS,
Petitioners

v.

GREATER HOUSTON TRANSPORTATION COMPANY D/B/A YELLOW CAB COMPANY AND THE CITY OF HOUSTON,
Respondents

BRIEF OF RESPONDENT THE CITY OF HOUSTON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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20 pp

QUESTION PRESENTED

Whether the Fifth Circuit Court of Appeals correctly applied *Town of Hallie v. City of Eau Claire*, ____U.S. ____, 105 S. Ct. 1713 (1985), in holding that the actions of the City of Houston in passing sections 45.10-1 and 45.10-2 of the Houston, Tex. Code of Ordinances, which prohibit a taxi from picking up passengers at Houston Intercontinental Airport unless the taxi is operated pursuant to a concession agreement with the City, and in entering into such a concession agreement with Greater Houston Transportation Company ("Yellow Cab"), were undertaken pursuant to a clearly articulated and affirmatively expressed state policy to replace competition with regulation?

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NO. 85-272

IN THE

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OCTOBER TERM, 1985

ARROW NORTHWEST, INC., A TEXAS CORPORATION, JIM ANDERSON, SANDRA H. ARNOLD, ERWIN J. SUSMAN, CAROL ANDERSON, MARGO A. RUSS, MATT CLASEN, JOHN WILLIAM ALSUP, MARGARET ALSUP, J. GRADY ORR, WENDEL M. RUSS, J. F. (PEPE) BACHOR, ELLIS C. FANCHER, ROBERT C. GREEN AND KATHRYN JACOBS,
Petitioners

v.

GREATER HOUSTON TRANSPORTATION COMPANY D/B/A YELLOW CAB COMPANY AND THE CITY OF HOUSTON,
Respondents

BRIEF OF RESPONDENT THE CITY OF HOUSTON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATUTES INVOLVED

In addition to the statutes set forth in the Petition, this case involves sections 16 and 21 of Tex. Rev. Civ. Stat. Ann. art 1175 (Vernon 1975), which are set forth in the Appendix to this Brief.

STATEMENT OF THE CASE

This lawsuit arises out of a concession agreement between the two Respondents which grants Greater Houston Transportation Company d/b/a Yellow Cab Company ("Yellow Cab") the right to pick up passengers at Houston's city-owned and operated Intercontinental Airport. The Petitioners are taxicab drivers and corporations who contend that the action of the City of Houston ("the City") in entering into the concession agreement violates sections 1 and 2 of the Sherman Act.[1]

The challenged concession agreement with Yellow Cab was entered into pursuant to sections 45-10.1 and 45-10.2 of the Houston, Tex. Code of Ordinances. Section 45-10.1 limits taxis picking up passengers at the airport to those operating under a concession contract with the City, and specifies certain charges applicable to all cabs picking up passengers at the airport. The concession agreement requires Yellow Cab to provide dispatchers at the airport in order to ensure orderly taxi flow and to guarantee continuous taxi service at the airport. The ordinance and contract were a result of the City's efforts to cope with the problems with airport taxi service which accompanied the opening of the airport in 1969, including "chaotic" taxicab operating conditions and "an extreme paucity of taxicab service for passengers arriving at night and in early morning hours." Petitioners' App. B at 2.

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1. The agreement was amended in 1980 to require Yellow Cab to permit other taxidrivers to subcontract with it on a nondiscriminatory basis. Petitioners' App. B at 3. Although before 1980 the agreement did not on its face provide for exclusivity, the court of appeals and the trial court assumed *arguendo* that it was exclusive. Petitioners' App. A at 2 n.1.

After an extensive opportunity for discovery, and on a record that Petitioners agreed was complete as to the issues raised, the trial court granted summary judgment to the City and to Yellow Cab. Petitioners' App. B. The court held that the City's actions were not covered by the antitrust laws under the state action immunity doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), as further explicated in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), and *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982). As for the claims against Yellow Cab, the court granted summary judgment on the antitrust claims on the grounds of *Noerr-Pennington* immunity and exercised its discretion to dismiss the pendent state law claims without prejudice.

The Fifth Circuit Court of Appeals affirmed the trial court's ruling. *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.*, 760 F.2d 607 (5th Cir. 1983), Petitioners' App. A. Assessing the City's actions under this Court's recent ruling in *Town of Hallie v. City of Eau Claire*, ____U.S.____, 105 S. Ct. 1713 (1985), the court of appeals concluded the City's actions qualified for *Parker* immunity on two independent grounds: the authorization (1) of taxicab regulation contained in Tex. Rev. Civ. Stat. Ann. art. 1175 (Vernon 1963), and (2) of airport regulation in Tex. Rev. Civ. Stat. Ann. art. 46d-1, *et seq.* (Vernon 1969). The court of appeals also ruled that Yellow Cab's contract with the City, resulting as it did from a "valid municipal and . . . state policy" was protected by *Noerr-Pennington*. Petitioners' App. A at 12.

REASONS FOR DENYING THE WRIT

Petitioners' principal contention is that the Fifth Circuit erred in its interpretation of the Texas statutes and Constitution in concluding that the City's challenged action was taken pursuant to a clearly articulated and affirmatively expressed state policy. Conceding, as they must, that *Town of Hallie* settled the legal standards for the state action exemption to apply—a standard they vigorously challenged in the Fifth Circuit—they here can take issue only with the Fifth Circuit's reading of the Texas law. They argue that the appeals court should have found a state policy prohibiting the City's regulation of taxicabs at the airport in the Texas Constitution and in the Municipal Airports Act, Tex. Rev. Civ. Stat. Ann. art. 46d-1, *et seq.* (Vernon 1969). Not only are Petitioners in error in their reading of Texas law, the issue they raise does not meet any criteria for consideration by this Court.

Petitioners also contend that the Fifth Circuit erroneously held that municipal action may qualify for *Parker* immunity even though not taken pursuant to an affirmatively and unambiguously expressed state policy, if the municipality has not unreasonably exercised its regulatory authority. Petitioners simply misread the appellate court's opinion, which expressly relies on the *Town of Hallie* standard. Indeed, the City has never suggested that a mere exercise of regulatory authority suffices for the state action exemption to apply. The focus of the argument before the Fifth Circuit instead was on Petitioners' various attempts to avoid the standard enunciated in *Town of Hallie* and on the City's support of the *Hallie* test. The Fifth Circuit correctly required that the City establish the requisite state regulatory policies under *Town of Hallie*.

I. THE CITY'S REGULATION IS WITHIN THE STATE ACTION EXEMPTION.

A. The antitrust laws do not apply to municipal regulations resulting from a clearly articulated and affirmatively expressed state policy.

The Sherman Act does not reach acts of the states as sovereigns, *Parker v. Brown*, 317 U.S. 341 (1943), nor does it reach the acts of municipalities undertaken pursuant to delegation of authority by the states. This Court has most recently examined the latter aspect of the *Parker* doctrine in *Town of Hallie v. City of Eau Claire*, ___ U.S.___, 105 S. Ct. 1713 (1985). In *Town of Hallie*, four unincorporated Wisconsin townships challenged the nearby City of Eau Claire's policy to provide sewage treatment services to adjoining landowners only if they agreed to become annexed by the city. The Court held that the city's actions fell within the state action immunity doctrine, despite the inability of the city to point to a specific state statute authorizing the use of monopoly power over sewage treatment to require annexation. The Court reiterated its prior statement in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), that the doctrine is applicable whenever the state legislature has "clearly articulated and affirmatively expressed [a] state policy to displace competition with regulation." *Id.* at 1719. The Court rejected the argument that the state legislature must say explicitly that it expected the city to engage in conduct that would have anticompetitive effects. Rather, it would be enough that "anticompetitive effects logically would result from [the] broad authority to regulate." *Id.* at 1718. The Court also held that, while state compulsion may best evidence state policy, it is not

a prerequisite, and active state supervision is not required of municipal regulators. *Id.* at 1720. Thus, the Wisconsin statute authorizing the city to fix the limits of its utility service and expressly providing that the city "shall have no obligation to serve beyond the area so delineated" was sufficient authorization for the city to condition any service beyond its territorial jurisdiction upon annexation.

B. The Municipal Airports Act and Article 1175 contain the clearly articulated and affirmatively expressed state policy required by *Town of Hallie*.

The court of appeals correctly held that two independent state policies are effectuated by sections 45.10-1 and 45.10-2 of the City Ordinances and the concession agreement. First, the State has delegated to the City authority to regulate extensively the taxicab business, and, as contemplated by the State, this regulation has displaced competition; second, the Municipal Airports Act authorizes and contemplates the arrangements made by the City.

The City regulates the taxicab business under the express delegation of such authority by the State. Article 1175 expressly provides that the City has exclusive dominion, control and jurisdiction over the public streets and may prohibit the use of any street in the City. Tex. Rev. Civ. Stat. Ann. art. 1175(16) (Vernon 1963). Further, the City may

> regulate, license and fix the charges or fares made by any person owning, operating or controlling any vehicle of any character used for the carrying of passengers for hire or the transportation of freight

> for hire . . . on the public streets and alleys of the city.

Tex. Rev. Civ. Stat. Ann. art. 1175(21) (Vernon 1963). Pursuant to this plenary statutory authority, the City has extensively regulated the taxicab business. The actions of which plaintiffs complain are part and parcel of the City's overall regulatory activity, the general need for which is not contested. In effect, the regulation at issue is no different from the City's control over taxicab rates governing trips from the airport. The City does not engage in illegal price fixing when it sets these prices, and likewise, the City did not illegally restrain trade when it passed the ordinance and granted the concession in question. The City may, consistent with the federal antitrust laws, establish airport rates that are unattractive to cab owners or that seem grossly unfair or unwise. The antitrust laws are not a panacea for injury caused by such regulation, which is clearly contemplated by state law.

Second, in addition to the extensive powers provided the City to regulate the taxicab business per se, the City has been authorized to establish and operate a municipal airport, such as Houston Intercontinental. Municipal Airports Act, Tex. Rev. Civ. Stat. Ann. art. 46d-1, *et seq.* (Vernon 1969). Article 46d-4 specifically authorizes granting contracts for the provision of goods and services at airports:

> (a) . . . In operating an airport . . . such municipality may . . . enter into contracts . . . and other arrangements for a term not exceeding forty (40) years with any persons:
>
> . . .

(2) conferring the privilege of supplying goods, commodities, things, services or facilities at such airport . . . ;

. . . .

In each case the municipality may establish the terms and conditions and fix the charges, rentals or fees for the privileges or services.

Tex. Rev. Civ. Stat. Ann. art. 46d-4 (Vernon 1969).[2]

Both statutes embody the Legislature's intent that municipal regulation of an airport and of the taxi business be "state action," and each, independently, supplies adequate authority for the City's actions. They show the State's decision (1) in the case of the taxicab business, to adopt economic regulation in the place of competition and (2) in the case of municipal airport operation, to adopt regulated public service. Considered together, they leave no doubt that the challenged restraint results from clearly articulated and affirmatively expressed state policy.

C. No contrary state policy prohibiting airport regulation is found in the Municipal Airports Act or the Texas Constitution.

Petitioners apparently do not contest that the regulatory features of the two statutes, if standing alone, would evidence the requisite state policy and would satisfy the state action immunity test of *Town of Hallie*. They do argue, however, that the regulatory features do not stand alone, because a stronger policy inconsistent with regulation is elsewhere expressed in the Municipal Airports

2. Not surprisingly, the Texas courts have recognized that the ordinance at issue here is authorized by the Municipal Airports Act. *See Bellew v. City of Houston*, 456 S.W.2d 185, 187 (Tex. Civ. App. —Houston [1st Dist.] 1970, writ ref'd n.r.e.).

Act and in Texas' Constitution. Petition at 12-15 & 17-19.[3]

First, relying upon *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025 (N.D. Tex. 1978),[4] Petitioners contend that Article 46d-7(b) of the Municipal Airports Act, which provides that no action undertaken by a municipality pursuant to it should be in violation of an act of Congress, evidences an intent that cities comply with the federal antitrust laws.

The short answer to Petitioners' contention is that independent authorization of the City's regulation at issue here is contained in Article 1175, which expressly authorizes the City to regulate taxicabs. A longer answer to Petitioners' argument is that their construction of the Municipal Airports Act is wrong. The argument ignores the Act's explicit authorization of contracts with suppliers of services, which in itself necessarily implies exclusion of some from the airport, and reads too much into a provision that the *Woolen* court admitted was not free from doubt. 461 F. Supp. at 1031. It simply is not reasonable to conclude that the legislature intended the federal antitrust laws to circumscribe the City's regulation of airport operations. It is far more likely that the legislature intended to prevent any conflict with the extensive federal regulation of commercial aviation, than it is to assume that the power the Texas

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3. Petitioners characterize the question as whether "implied" legislative intent or state policy is of a lesser order than "express" intent or policy. Petition at 6, 12-15, 17-19. The true question to be decided is whether the legislature did or did not intend to displace competition with regulation.

4. In view of the Fifth Circuit's holding in this case the *Woolen* court has since dismissed the plaintiffs' antitrust claims. *Woolen v. Surtran Taxicabs, Inc.*, Nos. CA-3-78-609, CA-3-78-745 (N.D. Tex. Aug. 8, 1985) (available on Lexis).

Legislature gave to municipalities with one hand was taken away by the other.[5] The only way to reconcile Article 46d-15's recognition that operation and regulation of an airport are governmental functions with Article 46d-7(b) is to conclude that the legislature intended municipal acts to be "state action" but directed cities not to encroach on areas of federal aeronautical regulation.

Petitioners also argue that authorization of the regulation under the airport and taxicab statutes is inconsistent with Article I, Section 26 of the Texas Constitution. They rely for this proposition on *City of Brenham v. Brenham Water Co.*, 67 Tex. 542, 4 S.W. 143 (1887), in which the Texas Supreme Court held that the Texas Constitution prohibits monopolies created by state political subdivisions that give a person an exclusive right to buy, sell, or make a thing or to pursue a designated employment. The Supreme Court went on to observe, however, that not all exclusive privileges are monopolies. 4 S.W. at 153 ("There are, however, certain classes of exclusive privileges which do not amount to monopolies."). One such class of exclusive privilege, which has been consistently recognized by Texas courts, includes those granted only upon the property or premises of the grantor. *State v. Gulf Refining Co.*, 279 S.W. 526 (Tex. Civ. App.—Austin 1925, writ ref'd), cited with approval in *Schnitzer v. Southwest Shoe Corp.*, 364 S.W.2d 373,

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5. Even Petitioners acknowledge that their interpretation requires the Court to give an internally inconsistent reading to the statute when they argue that "the very statute that *authorized* the City to enter into a taxicab concession agreement expressly directs the City not to engage in any conduct which would be in violation of any Act of the Congress of the United States [including] . . . the federal antitrust laws." Petition at 12 (emphasis added). Moreover, the relevant question is whether the antitrust laws apply to the City, not whether it has violated them.

374 (Tex. 1963). *See also Lewis v. Weatherford, M.W. & N.W. Ry.*, 36 Tex. Civ. App. 48, 81 S.W. 111 (1904, writ ref'd); *Clisbee v. Chicago, R.I. & G. Ry.*, 230 S.W. 235 (Tex. Civ. App.—Fort Worth 1921, writ ref'd). For this reason, a Texas court of civil appeals has held in a case strikingly similar to this one that a city's grant of an exclusive contract for ground transportation service at a city-owned airport is not a prohibited monopoly under the Texas Constitution. *Airport Coach Service, Inc. v. City of Fort Worth*, 518 S.W.2d 566, 572 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.). This Texas decision construing the state constitution, which is squarely in point, is controlling here.[6] *See Continental Bus System, Inc. v. City of Dallas*, 386 F. Supp. 359, 365-66 (N.D. Tex. 1974).

II. THE FIFTH CIRCUIT EXPRESSLY AND CORRECTLY UTILIZED *TOWN OF HALLIE* IN UPHOLDING THE AIRPORT REGULATION.

Petitioners read the Fifth Circuit's opinion to hold that municipal action may qualify for *Parker* immunity even though "not done pursuant to clearly articulated and affirmatively expressed state policy if the municipality has not unreasonably exercised its authority granted to it by the State." Petition at 17. They assert that the Fifth Circuit's ruling in this regard does not comport with *Town of Hallie* because it permits consideration of an alternative

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6. Petitioners also rely upon a contrary interpretation by the Arkansas Supreme Court of an identical Arkansas constitutional provision. Petition at 19. It should be needless to say that the Arkansas Supreme Court's interpretation of its own constitution carries no weight in the face of a different interpretation by a Texas appeals court of the Texas Constitution.

factor to the "clearly articulated and affirmatively expressed state policy" required by *Town of Hallie*. Petition at 16-17.

The statement in the Fifth Circuit's opinion that Petitioners refer to is the following:

> Texas has delegated the management of both private paid carriers and airports to the state's municipalities through statutes expressly directed toward these ends. We know that the Supreme Court has not granted full license to the states to confer monopoly status with a magical pass of the legislative wand. But where a state has to this extent articulated a policy [of] regulatory deference to its municipalities, and where a city has not unreasonably exercised its authority, the city's actions are not subject to the constraints of federal antitrust law.

Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co., 760 F.2d at 611, Petitioners' App. A at 9 (citation deleted). Assuming arguendo that the Fifth Circuit viewed the "not unreasonable exercise" by a municipality of its state-granted regulatory authority as a prerequisite to claiming *Parker* immunity, it is plain from the quoted passage that the Fifth Circuit viewed this prerequisite *as additional to* the prerequisite of a "clearly articulated and affirmatively expressed state policy," not as an alternative to such a policy. The City, by demonstrating both, has thus fully satisfied *Town of Hallie*.[7] If the Fifth Circuit has imposed additional requirements, it has not done so in a manner harming Petitioners.

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7. Petitioners undoubtedly read too much into the Fifth Circuit's opinion. It is likely that the court merely intended to reserve for a later day the question whether an unreasonable exercise of authority clearly granted to a municipality by the state would qualify for *Parker* immunity.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Tex. Rev. Civ. Stat. Ann. art. 1175 (16) (Vernon 1963):

To have exclusive dominion, control, and jurisdiction in, over and under the public streets, avenues, alleys, highways and boulevards, and public grounds of such city and to provide for the improvement of any public streets, alleys, highways, avenues or boulevards by paving, raising, grading, filling or otherwise improving the same and to charge the cost of making such improvement against the abutting property, by fixing a lien against the same, and a personal charge against the owner thereof according to an assessment specially levied therefor in an amount not to exceed the special benefit any such property received in enhanced value by reason of making such improvement, and to provide for the issuance of assignable certificates covering the payments for said cost, provided that the charter shall apportion the cost to be paid by the property owners and the amount to be paid by the city, and provided further, that all street railways, steam railways, or other railways, shall pay the cost of improving the said street between the rails and tracks of any such railway companies and for two feet on each side thereof. The city shall have the power to provide for the construction and building of sidewalks and charge the entire cost of constructing of said sidewalks, including the curb, against the owner of abutting property, and to make a special charge against the owner for such cost and to provide by special assessment a lien against such property for such cost; to have the power to provide for the improvement of any such sidewalk or the construction of any such curb by penal ordinance and to declare defective sidewalks to be a public nuisance. The power herein granted for making street improvements and assessing the cost by special assessment in the manner herein stated shall not be construed to prevent any city from adopting any other method or plan for the improvement of its streets, sidewalks, alleys, curbs, or boulevards, as it may deem advisable by its charter.

Tex. Rev. Civ. Stat. Ann. art 1175 (21) (Vernon 1963):

To regulate, license and fix the charges or fares made by any person owning, operating or controlling any vehicle of any character used for the carrying of passengers for hire or the transportation of freight for hire on the public streets and alleys of the city.

Supreme Court, U.S.
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NO. 85-272

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ARROW NORTHWEST, INC., A TEXAS CORPORATION, JIM ANDERSON, SANDRA H. ARNOLD, ERWIN J. SUSMAN, CAROL ANDERSON, MARGO A. RUSS, MATT CLASEN, JOHN WILLIAM ALSUP, MARGARET ALSUP, J. GRADY ORR, WENDELL M. RUSS, J. R. (PEPE) BACHOR, ELLIS C. FANCHER, ROBERT C. GREEN and KATHRYN JACOBS,
Petitioners

v.

GREATER HOUSTON TRANSPORTATION COMPANY D/B/A YELLOW CAB COMPANY AND THE CITY OF HOUSTON,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a municipal airport taxicab service concession agreement procured by concededly arm's length negotiation may be challenged on antitrust grounds in view of the *Noerr-Pennington* doctrine.

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Petitioners

v.

GREATER HOUSTON TRANSPORTATION COMPANY D/B/A YELLOW CAB COMPANY AND THE CITY OF HOUSTON,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

The ground passenger departing newly built Houston Intercontinental Airport in 1969 was met with atrocious taxicab service. Cab unavailability, over-charging, flat-rating, refusal to provide short trips, and general con-

fusion reigned. (Appendix A). The situation prompted Greater Houston Transportation Company ("Yellow Cab") to petition the City of Houston to solve the existing problems by entering into an airport taxicab service concession agreement with Yellow Cab. (Appendix A). In early January 1970, the City's Directors of Aviation and Public Service advised the Mayor that the Yellow Cab petition was accurate and that its proposal should be adopted. (Appendix B, C). On January 14, 1970, the Houston City Council, by motion, authorized City officials to negotiate an airport taxicab service concession agreement with Yellow Cab, provided that Yellow Cab permit other taxicab companies to operate under its terms. (Appendix D). The concession agreement was executed on February 11, 1970. In exchange for granting the privilege of serving the airport, the concession imposed considerable obligations upon Yellow Cab, including the provision of adequate cab service, the construction and operation of airport taxicab starter facilities, the employment of taxicab starters and the payment to the City of monthly fees. The concession was by its terms non-exclusive, and in fact provided for Yellow Cab to permit all other taxicab companies in Houston to operate under its terms. On February 11, 1970, Yellow Cab extended written offers to all other Houston taxicab companies to operate under the concession. (Appendix E). Since then, most Houston taxicab companies have accepted the offer and therefore serve the airport on equal terms and conditions.

It is conceded by Petitioners that Yellow Cab's petitioning efforts were "undertaken at arm's length" with the City. Petitioners' Fifth Circuit Brief, 46. There is neither allegation nor evidence that Yellow Cab employed false

information, bribery or any other type of "dirty tricks" in its petitioning effort. Petitioners do not contend that Yellow Cab in any way blocked their access to the municipal political forum or impaired their ability to seek a concession agreement. There is no evidence of any predatory or exclusionary intent on the part of Yellow Cab.

Notwithstanding these undisputed facts, Petitioners filed this action, contending that Yellow Cab's successful petitioning efforts effected a restraint of trade made unlawful by federal antitrust law. The district court properly entered summary judgment in favor of Yellow Cab on the grounds that Yellow Cab was privileged to petition the City for the concession. See Petitioners' Brief, Appendix B. The Fifth Circuit unanimously affirmed. See Petitioners' Brief, Appendix A.

REASONS FOR DENYING THE WRIT

The courts below properly recognized that Yellow Cab was privileged, under the well settled *Noerr-Pennington* antitrust doctrine, to petition the City of Houston for an airport taxicab concession. Yellow Cab exercised its constitutional right to persuade the government to take a particular course of action. Petitioners had the same right, and there is no evidence that Yellow Cab prevented Petitioners from exercising this right. Yellow Cab is not subject to antitrust liability simply because its petitioning was more successful than that of Petitioners'. Furthermore, there is no exception to *Noerr-Pennington* applicable to this case. *Noerr-Pennington* immunity is not dependent upon the existence of sovereign immunity conferred by *Parker v. Brown*, 317 U.S. 341 (1943). No so-called "commercial exception" applies because even if such an exception were viable it would be inapposite here.

I. Yellow Cab's Petitioning Is Protected From Antitrust Challenge By The *Noerr-Pennington* Doctrine.

Petitioners allege nothing more than that Yellow Cab has successfully secured a concession contract from the City of Houston. However, private efforts to secure even anticompetitive government action do not violate the Sherman Act, as a matter of law. *Eastern R.R. Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

Yellow Cab was fully entitled to petition for and operate under the concession, because

> *no violation* of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws.

Noerr, supra, 365 U.S. at 135 (emphasis added).

> Very simply, efforts to influence public officials do not violate the antitrust laws *even though intended to eliminate competition*. Such conduct is *not illegal*, either standing alone or as part of a broader scheme, itself violative of the Sherman Act.

Pennington, supra, 381 U.S. at 670 (emphasis added).

The doctrine of these two cases, the so-called "*Noerr-Pennington* doctrine", holds that:

> The right to petition administrative agencies for favorable action is outside the perimeter of activity proscribed by antitrust laws.

American Tel. & Tel. Co. v. Delta Communications Corp., 408 F.Supp. 1075, 1098 (S.D. Miss. 1976), *aff'd*, 579 F.2d 972 (5th Cir. 1978), *cert. denied*, 444 U.S. 926 (1979).

Noerr-Pennington is bottomed upon the constitutional right of petition and the need to assure "uninhibited access to government policy makers." *Mid-Texas Communication Systems, Inc. v. American Tel. & Tel. Co.*, 615 F.2d 1372, 1383 (5th Cir. 1980), *cert. denied*, 449 U.S. 912 (1980). This right of uninhibited access "extends to all departments of the Government." *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

The leading authorities on federal antitrust law have concluded that the *Noerr-Pennington* doctrine means as follows:

> A specific purpose to secure anticompetitive governmental action and to burden rivals cannot itself make activities wrongful. Monopolists or collaborators are privileged to pursue their private and selfish objectives through legislation, adjudication, or executive and administrative machinery.

Areeda and Turner, *Antitrust Law*, Section 201 (1978).

> *It is accepted that everyone is entitled to petition the government for legislation serving his selfish interests* . . . And equally privileged are efforts to influence . . . administrative rulings which have immediate operative effects—for example, making grants, *awarding or retracting franchises*, licenses or permits.
>
> * * *
>
> *The absence of an antitrust violation is most obvious when the petitioner actually obtains the result he seeks*, and clearest in the case of legislation. What-

> ever the petitioner's objective, the enactment declares the public interest as perceived by the legislature. To be sure, the legislature may be mistaken or unaware of the consequences of its actions, or it may be responding to political pressures not truly reflecting "the public interest", *but the antitrust court may not reappraise the legislature's assessment of the public welfare. Government is its own judge of how much competition is desirable. If a statute excludes everyone but the monopolist from a market, the monopolist cannot himself be faulted.* Nor is there fault for requesting or otherwise promoting the legislation . . . the antitrust court must recognize that any harm to competition results from government decision rather than from the private action that may have induced official action.

Areeda and Turner, *Antitrust Law*, Section 202 (1978) (emphasis added).

This case is squarely governed by the application of *Noerr-Pennington* in the cases of *In re Airport Car Rental Antitrust Litigation*, 521 F.Supp. 568 (N.D. Cal. 1981), *aff'd*, 693 F.2d 84 (9th Cir. 1982), *cert. denied*, 462 U.S. 1133 (1983) and *BusTop Shelters, Inc. v. Convenience & Safety Corp.*, 521 F.Supp. 989 (S.D.N.Y. 1981).

In *In re Airport Car Rental Antitrust Litigation,*

> a number of car rental companies complained in substance that [Hertz and Avis] engaged in joint activities to influence airport authorities to exclude competing companies from airports in violation of Section 1 and 2 of the Sherman Act.

In re Airport, supra, 521 F.Supp. at 570. The district court granted defendants' *Noerr-Pennington* motion for summary judgment, noting that the challenged conduct

"falls outside the scope of the Sherman Act." *In re Airport, supra,* 521 F.Supp. at 577.

Likewise, in *BusTop Shelters,* plaintiff bus stop shelter franchisee brought an antitrust action challenging a city's award of an exclusive franchise to a competitor. The district court granted defendants' *Noerr-Pennington* motion to dismiss:

> If BusTop's allegations are assumed to be true, as they must be on a motion to dismiss . . . they nevertheless seem to fall squarely within the antitrust exemption carved by *Noerr* and *Pennington.* The specific acts of which BusTop complains, as outlined above, consist of alleged pressure on governmental officials, . . . as well as the actions allegedly taken by governmental officials in response to that pressure, such as . . . denying a franchise to one company while awarding it to another. . . . Nothing could be more clearly a joint effort to influence public officials, which is precisely what *Noerr* and *Pennington* exclude from the coverage of the Sherman Act.

BusTop Shelters, supra, 521 F.Supp. at 994.

In re Airport and *BusTop Shelters, supra,* though dispositive of Petitioners' claims, do not stand alone. Time and again, complaints similar to those of Petitioners' here have been summarily dismissed on *Noerr-Pennington* grounds. Each case involved—as here—a challenged effort by defendant to secure or protect a concession granted by a governmental agency.

In each case, the result is the same: the vindication of a defendant's right to petition government, as articulated by *Noerr-Pennington. See, e.g., Hopkinsville Cable TV, Inc. v. Pennyroyal Cablevision, Inc.,* 562 F.Supp. 543 (W.D. Ky. 1982) (summary judgment on *Noerr-Penning-*

ton grounds entered for defendant despite rival plaintiff's claim that defendant secured exclusive municipal service franchise); *Huron Valley Hospital v. City of Pontiac,* 466 F.Supp 1301 (E.D. Mich. 1979), *vacated and remanded on other grounds,* 666 F.2d 1029 (6th Cir. 1981) (summary judgment on *Noerr-Pennington* grounds entered for defendants despite plaintiff's complaint that defendants conspired to prevent plaintiff from securing license to operate hospital); *Metro Cable Co. v. CATV of Rockford Inc.,* 516 F.2d 220 (7th Cir. 1975) (dismissal on *Noerr-Pennington* grounds affirmed despite plaintiff's claim that defendant's exclusive cable television franchise precluded plaintiff from competition); *Subscription Television, Inc. v. Southern California Theatre Owners Ass'n.,* 576 F.2d 230 (9th Cir. 1978) (directed verdict for defendant on *Noerr-Pennington* grounds affirmed despite plaintiff's claim that defendant's lobbying was intended to interfere with plaintiff's proposed competitive activity); *Mark Aero, Inc. v. Trans World Airlines, Inc.,* 580 F.2d 288 (8th Cir. 1978) (failure to dismiss on *Noerr-Pennington* grounds held error on appeal despite plaintiff's allegations that defendants induced city officials to take anticompetitive action toward plaintiff); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers,* 542 F.2d 1076 (9th Cir. 1976), *cert. denied,* 430 U.S. 940 (1977) (dismissal on *Noerr-Pennington* grounds affirmed despite plaintiff's allegations that defendant opposed the grant of city permits to plaintiff in order to eliminate competition); *Central Bank of Clayton v. Clayton Bank,* 424 F.Supp. 163 (E.D. Mo. 1976), *aff'd,* 553 F.2d 102 (8th Cir. 1977), *cert. denied,* 433 U.S. 910 (1977) (dismissal on *Noerr-Pennington* grounds of plaintiff's complaint that defendants' opposition to plaintiff's competitive bank charter applica-

tion precluded plaintiff from competition); *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969) (*Noerr-Pennington* summary judgment affirmed despite plaintiff's claim that defendant's exclusive franchise for garbage pick-up resulted in termination of plaintiff's business).

Because Petitioners' complaint alleges that Yellow Cab did no more and no less than successfully petition the City of Houston for a concession and because there is no allegation that Yellow Cab prevented Petitioners' from doing likewise, the conduct alleged by Petitioners falls squarely within the ambit of *Noerr-Pennington's* protection. The writ should therefore be denied.

Unable to avoid the wholly dispositive impact of *Noerr-Pennington*, Petitioners seem to imply that certain limitations* to the doctrine apply here. That is simply not the case, as will be demonstrated in part II below.

II. Petitioners' Sole Question Presented Relating To Yellow Cab Is Not Worthy Of Review By This Court.

Petitioners raise but one narrow question for review by this Court relating to Yellow Cab's conduct: can a party invoke *Noerr-Pennington* to immunize petitioning for commercial government activity which itself is not entitled to *Parker v. Brown* immunity? This narrow question is not worthy of review by this Court for 3 independent reasons.

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* Petitioners did not plead below nor do they argue now that the "sham" exception to *Noerr-Pennington* is applicable. See *Noerr, supra*, 365 U.S. at 144. Nor could they in view of the facts involved. Petitioners have also abandoned any claim that a "co-conspirator" exception to *Noerr-Pennington* is applicable to the facts of this case.

A. The City of Houston is *Parker v. Brown* Antitrust Immune and Therefore Yellow Cab's Petitioning Efforts are *Noerr-Pennington* Antitrust Exempt.

Petitioners implicitly concede that *Noerr-Pennington* would protect even commercial petitioning so long as the activity secured thereby is entitled to *Parker v. Brown* immunity. That is precisely the case here. As both courts below correctly held, the City of Houston is immune from antitrust liability in this case on *Parker v. Brown* grounds. That being the case, Yellow Cab is likewise exempt.

B. Yellow Cab's *Noerr-Pennington* Antitrust Exemption is not Dependent upon the City of Houston's *Parker v. Brown* Immunity.

Even if the City of Houston has no *Parker v. Brown* protection, Yellow Cab is entitled to *Noerr-Pennington* protection. The underpinnings of the *Parker v. Brown* doctrine are completely unrelated to those of the *Noerr-Pennington* doctrine. *See, In re Airport Car Rental Antitrust Litigation, supra,* 521 F.Supp. at 584. They are "two separate doctrines." *New Mexico v. American Petrofina,* 501 F.2d 363, 368 (9th Cir. 1974). *Parker v. Brown* sovereign immunity is predicated upon governmental status; *Noerr-Pennington* petitioning immunity is predicated largely upon the First Amendment. Thus, *Noerr-Pennington* petitioning immunity neither presupposes nor depends upon *Parker v. Brown* sovereign immunity. *Greenwood Utilities v. Mississippi Power Co.,* 751 F.2d 1484 (5th Cir. 1985). Indeed, *Noerr-Pennington* immunity may attach even though *Parker v. Brown* immunity is absent. *See, e.g., In re Airport Car Rental Antitrust Litigation, supra,* 693 F.2d at 87. The basis for this mutual independence is compelling:

> Of course, the governmental action may itself be invalid because it is unconstitutional or, in the case of state legislation, because it is inconsistent with federal law. But the fact that a statute turns out to be invalid cannot be grounds for attaching liability to petitioning for it; to hold that one petition at his peril would unduly burden the constitutional privilege of petitioning.

Areeda and Turner, *Antitrust Law*, Section 202 (1978).

> The *Noerr-Pennington* doctrine is based on the first amendment right of petition and such a right would be considerably chilled by a rule which would require an advocate to predict whether the desired legislation would withstand a constitutional challenge in the courts and to expose itself to a potential treble damage antitrust action based on that prediction. The fact that the legislative action sought is subsequently declared unconstitutional does not remove the immunity from the antitrust laws created by the *Noerr-Pennington* doctrine. As noted in *Franchise Realty, supra,* "We know of no case that holds that joint action which succeeds in persuading a public body to make an erroneous decision can give rise to a cause of action under the Sherman Act." 542 F.2d at 1079, n.2.

Subscription Television, Inc., supra, 576 F.2d at 233-234.

The facile notion that *Parker* immunity and *Noerr* immunity are coextensive and thus mutually presuppositive is dangerous in its simplicity. "Whatever appeal such a symmetrical interpretation might have, it is, as discussed above, incompatible with First Amendment protection extended to activities constituting commercial speech.

Moreover, the symmetry is more apparent than real." *In re Airport Car Rental Antitrust Litigation, supra,* 521 F.Supp. at 583.

C. No "Commercial Exception" to Yellow Cab's *Noerr-Pennington* Antitrust Exemption Exists.

Petitioners seem to suggest that *Noerr-Pennington* would apply but for the allegedly "commercial" aspects of the activity in question. Petitioners apparently seek to invoke a so-called "commercial exception" to *Noerr-Pennington,* an exception never recognized by this Court or a majority of the lower federal courts.

This Court has ruled that *Noerr-Pennington* protects not only political petitioning, but also petitioning to promote business and economic interests.

> We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their *business and economic interests vis-a-vis their competitors.* (emphasis added).

California Motor Transp. Co., supra, 404 U.S. at 510-511.

Lower federal courts have likewise recognized that *Noerr-Pennington* is "not limited to political or policy matters." *In re Airport Car Rental Antitrust Litigation, supra,* 521 F.Supp. at 578. *Accord: Greenwood Utilities, supra,* 751 F.2d 1484 ("We reject any notion that there should be a commercial exception to *Noerr-Pennington* . . ."); *Reamco, Inc. v. Allegheny Airlines,* 496 F.Supp.

546, 556, n. 6 (S.D.N.Y. 1980); *In re Airport Car Rental Antitrust Litigation, supra,* 693 F.2d at 87 ("there is no commercial exception to *Noerr-Pennington*"). *See also, Metro Cable, supra,* 516 F.2d at 229-30; *Sun Valley Disposal Co., supra,* 420 F.2d at 342-43.

Even if a so-called "commercial exception" were viable, it would not apply to this case because the political process was clearly invoked by the petitioning involved. It has been squarely held that efforts to influence municipal government with respect to airport access rights are purely political. In *Mark Aero, Inc., supra,* 580 F.2d 288, plaintiff charter air taxi operator sued several major airlines because of their opposition to plaintiff's efforts to re-open and use an abandoned municipal airport in competition with defendants. The Eighth Circuit dismissed the action and held:

> [plaintiff] invites us to resolve the matter through the application of the antitrust acts. We decline to do so and order the case dismissed. This is a *governmental problem,* to be solved by the electorate through its proper officials. There is no warrant for our intervention on plaintiff's theory that the antitrust statutes control.

Mark Aero, supra, 580 F.2d at 290 (emphasis added).

Similarly, in *Metro Cable, supra,* 516 F.2d at 220, the Seventh Circuit rejected the applicability of a "commercial exception" to *Noerr-Pennington* in the context of litigation challenging a municipality's award of a cable television franchise. The court noted:

> City Council was a legislative body, acting as such, and the conduct challenged here thus occurred in a political setting.
>
> * * *

> As a legislative body, it and its committees operate in a political setting. Its members are subject to lobbying and other forms of ex parte influence which *Noerr* recognized are a part of the political process and means by which the people are entitled to communicate with their representatives.

III.

CONCLUSION

By Petitioners' own admission, Yellow Cab has done no more and no less than successfully conduct "arm's length contractual negotiations" with the City of Houston. It is not alleged, nor is there any evidence submitted, that Yellow Cab blocked Petitioners' access to the same municipal political process.

> Taking plaintiff's claim at face value, the defendants conspired to influence the airport authorities to exclude plaintiff from access to the on-airport market. Access to that market is the relevant area of competition in this case, and plaintiff has offered no facts to show that it was barred from competing with defendants for contracts or leases with airport authorities, albeit under conditions not to its liking.
>
> * * *
>
> Plaintiff has offered no facts in support of a claim of denial of access to the airport authorities.

In re Airport Car Rental Antitrust Litigation, supra, 521 F.Supp. at 574.

Petitioners seek the intercession of federal authority into the municipal political process, under the rubric of the antitrust laws, in the hope of turning a political disappointment into an economic windfall. This cannot be

done. "The proscriptions of the [Sherman] Act, tailored as they are for the business world, are not at all appropriate for application in the political arena". *Noerr, supra,* 365 U.S. at 141. In short,

> the Sherman Act, as interpreted by *Noerr,* simply does not penalize as an antitrust violation the petitioning of a government agency.

Coastal States Mktg., Inc. v. Hunt, 694 F.2d 1358, 1366 (5th Cir. 1983).

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

PAUL E. HARRIS
BRADLEY WESTMORELAND
HARRIS, WESTMORELAND
& HERRING
Texas Commerce Bank Building
Houston, Texas 77002
(713) 546-2900

Counsel for Respondent
Greater Houston Transportation Company

September 18, 1985

APPENDIX A

GREATER HOUSTON TRANSPORTATION COMPANY
1406 Hays St., Houston, Texas 77009, 222-1481

Stanley Danburg
President

December 31, 1969

Honorable Mayor and City Council
City of Houston, Texas
City Hall

Gentlemen:

Since the Houston Intercontinental Airport opened in June, 1969, taxicab service there, as supplied by all taxicab companies, has not been satisfactory. This company has devoted considerable study to this problem and its possible solutions. One of the major stumbling blocks to the lack of successful cab service has been the absence of taxicab starters. Some of the problems resulting out of this deficiency have been over-charging, flat-rating, refusal to take short trips and a general lack of true public service. The poor impression to visitors of Houston that this creates is far short of exemplifying the type of city we are.

We are convinced that the only efficient means of providing the required service is the means employed by nearly every other major city in the nation—a concession contract between the city and a responsible, major taxicab company equipped for and capable of supplying the service needed. This proposal has been discussed in some detail and this letter arises out of meetings held with both

the Department of Aviation and the Department of Public Service, City of Houston.

Accordingly, Greater Houston Transportation Company proposes to contract with the City of Houston to supply taxicab service at the Houston International Airport upon the following terms:

1. The company will, at its own expense, maintain full time starters at both existing terminal buildings and future terminals to be built. A reasonable estimate of the cost of maintaining these starters for the two existing terminals is $36,000 per year at the present time.

2. The company will pay to the City of Houston the same compensation per passenger as is payed by the present Airport Ground Transportation concession (approximately thirty-three cents per head). This is the average fee per passenger carried by the Airport Ground Transportation Company at this time and Greater Houston Transportation Company proposes to pay the same. If the city's average fee per passenger carried by the Airport Ground Transportation Company should increase, the fee payed by Greater Houston Transportation Company would increase accordingly.

3. Not withstanding the terms of the last paragraph, Greater Houston Transportation Company will guarantee a payment to the City of Houston each month of not less than $5,000. This guarantee will immediately give the City of Houston approximately 50% more income than it now gets from taxicabs (based on figures obtained from the City of Houston, Depart-

ment of Aviation). This department estimates income at approximately $36,000 a year at the present time.

4. The company proposes that this contract shall extend for a term of ten years from the date of its execution.

5. The company does not propose to charge a flat rate from the airport to points in Houston. All trips will be made on meter charges, as required by the City Taxicab Ordinance.

6. Our company proposes two-way radio communication between terminals and between the airport and our central dispatching system in order to assure adequate taxicab service at all times.

7. Only taxicabs operated under taxicab airport concession contract (as outlined by this proposal) shall be permitted to pick up passengers at any airport operated by the City of Houston. (Of course, all taxicabs are entitled to discharge passengers at the airport).

8. The company will at all times keep available for airport taxicab service the necessary number of taxicabs, fully equipped with radios and other equipment required by the Taxicab Ordinance of the City of Houston and will man these taxicabs with personnel licensed under the Taxicab Ordinance of the City of Houston.

Under the present conditions with 88 cab spaces and the lack of proper starters, many cabs sit two and three hours waiting for trips, while at peakload periods too few cabs exist. The result of this poor utilization of taxicab permits hurts public service in the rest of the City of Houston.

Only a major taxicab company such as the Greater Houston Transportation Company could possibly qualify to make such a contract as herein proposed. It is necessary that between 300 and 400 taxicabs be operated in order to assure enough cabs available for peakload periods. During week days between 250 to 300 trips go out of the Houston Intercontinental Airport by cab, squeezed into the peak periods of 7 A.M. to 7 P.M. This 40 to 50 trips per hour requires 300 and 400 operating cabs, as any company only operates 20% to 25% of it cabs at the airport at any given time. In addition, certain peak periods, such as the Homebuilders Convention, could require from 150 to 200 cabs per hour. Looking down the road at jumbo jets, the taxicab requirement could even grow greater. Since 500 permits are owned and/or operated by this company out of 689 permits issued by the City of Houston and the remaining permits are scattered among 16 companies (7 of which are one-cab companies), it is clear that only the Greater Houston Transportation Company can assure and furnish to Houston first-class taxicab service.

Through a cab contract of the nature herein proposed, Greater Houston Transportation Company can assure the City of Houston better taxicab service at lower costs to the traveling public. Through the use of a properly trained taxi starter, much of the traveling public will share rides in cabs to Downtown, South End, and other major destinations. This sharing of rides and the resulting lower fares per person will come back to help our city in many ways.

On January 18, 1970, Houston will enjoy the largest convention ever held in our city. It would be most advantageous to the city and our company for this arrangement to be completed before these visitors begin arriving and we are therefore asking that this contract be expedited if possible.

Yours very truly,

/s/ STANLEY DANBURG
Stanley Danburg

CC: Mr. Joe Foster—Department of Aviation
Mr. Tom Tyson—Public Service Department

SD/olr

APPENDIX B

CITY OF HOUSTON
Inter Office Correspondence

To: Mayor Louie Welch
Through the City Secretary

From Joseph A. Foster, Director
Department of Aviation

Date January 6, 1970

Subject Taxicab Proposal—Houston
Intercontinental Airport

I have reviewed the attached proposal of Mr. Stanley Danburg, President of Greater Houston Transportation Company, to provide taxicab service at the Houston Intercontinental Airport.

Mr. Danburg's appraisal of the taxicab situation at the Airport is an accurate one and his proposal is, in my opinion, the only solution to the problem. Under the present arrangement the Department of Aviation has no control over the type and availability of taxicab service from the Airport. There is no obligation or responsibility on any of the various companies to provide the service. Since the service is now provided by a variety of cab owners, it is difficult to identify the owners of cabs responsible for over-charging customers, failing to take them to nearby destinations, and other frequent complaints we receive from the public.

It is impossible to prepare and have executed by both parties an agreement for this service prior to the commencement of the Home Builders Convention.

The Director of Aviation recommends:

1. That City Council, by motion, adopt Mr. Danburg's proposal and authorize the immediate commencement of the service in accordance with the terms of the proposal pending completion of a formal agreement.

2. That the Director of Aviation and the City Legal Department negotiate an agreement with Greater Houston Transportation Company, substantially in accordance with the attached proposal, obtain the execution thereof by Greater Houston Transportation Company, and submit the same to City Council for approval.

Respectfully,

/s/ JOSEPH A. FOSTER
Director
Department of Aviation

JAF:CFW:mml
Attachment

APPENDIX C

CITY OF HOUSTON
Inter Office Correspondence

To: Mr. Gene Gatlin
Executive Assistant
Mayor's Office

From Thomas B. Tyson, Director
Public Service Department

Date January 7, 1970

Subject Proposal by Greater Houston Transportation Co. to provide exclusive taxicab service from Intercontinental Airport.

Following is recommendation on Greater Houston Transportation Company proposal.

Problems concerning taxicabs have existed ever since the opening of the Intercontinental Airport. The principal ones being excessive number of taxicabs on stands, activities of drivers on stands during long waits for trips, flat rating and controversies between taxicab and limousine drivers. Several meetings between all parties or groups involved have been held and it was agreed that taxicab starters were needed and the number of taxicabs waiting for trips should be reduced.

The proposal by Greater Houston Transportation Company would provide additional income from taxicabs for the City and would protect it from any loss of revenue due to taxicabs taking business away from the Limousine Operator through more effective competition. The concession agreement would provide taxicab starters and

this should correct many problems that we have been having with taxicabs at the airport. In addition, it should also improve taxicab service to other areas of the city because the concessioner would be required to limit the number of taxicabs at the airport to just that number needed for airport business. Granting of the concession would prohibit other taxicab companies that are now serving the airport from picking up passengers there.

I recommend a concession contract be negotiated with Greater Houston Transportation Company providing provisions covering the following points:

1. Execution of concession contract should not effect jurisdiction of this department over taxicabs. Further, nothing in the concession contract should in any way effect Greater Houston's obligation to provide taxicab service throughout the city.

2. Taxicab dispatchers should be required to keep records on pickups as directed by the Director of Public Service and Aviation Department.

3. Although this concession contract will grant exclusive privilege to picking up passengers at the airport, Greater Houston should be required to allow other companies to pick up provided they pay a reasonable fee to Greater Houston and abide by reasonable rules and regulations of that company.

Respectfully submitted,

/s/ TOM TYSON
Director
Public Service Department

TBT/lm

APPENDIX D

CITY OF HOUSTON
Inter Office Correspondence

To Mayor Louie Welch
Through City Secretary

From Joseph A. Foster, Director
Aviation Department

Date February 4, 1970

Subject Negotiated agreement between City of Houston and Greater Houston Transportation Company for taxicab service at Houston Intercontinental Airport

By Motion No. 70-167, passed the 14th day of January, 1970, City Council authorized the Director of Aviation and the City Attorney to negotiate an agreement with Greater Houston Transportation Company substantially in accordance with its proposal with certain specified requirements. The motion stipulated:

1. That the agreement should not affect the jurisdiction of the Public Service Department over taxicabs nor effect said company's obligation to provide taxicab service throughout the City;

2. That taxicab dispatchers be required to keep records on pickups as directed by the Director of Public Service and the Director of Aviation;

3. That the Greater Houston Transportation Company be required to allow other cab companies to

pick up passengers at the airport provided they pay a reasonable fee to Greater Houston Transportation Company, such fee to be approved by the Director of Public Service, and that such companies abide by reasonable rules and regulations of Greater Houston Transportation Company; and

4. That the regulations under which the starter will work shall be approved by the Director of Aviation and the Director of Public Service.

The attached agreement contains all of the above items except the third one.

The proposal of Greater Houston Transportation Company gave to the City the ability to look to a single company and hold it responsible for providing taxicab service at the airport that would not be possible if the taxicab concessionaire should be required to permit any and all other taxicab operators and companies to operate under the terms of its contract. The concessionaire would be unable to force other taxicab drivers and taxicab companies, that it did not own or employ, to comply with the contractual requirements imposed upon the concessionaire by its contract with the City. In other words, the City would be imposing upon the taxicab concessionaire responsibility for the acts of other taxicab drivers and taxicab companies over which the concessionaire would have no control. In this respect, we have been advised by the City Legal Department that City Council cannot delegate to a private company the authority to establish rules and regulations for the operation of taxicabs on the airport. Section 1(f) of the contract as prepared by the City Legal Department grants the concessionaire the right:

"To allow other taxicab companies operating taxicabs licensed by the City of Houston to operate under this contract by subcontracting with the concessionaire, provided the concessionaire remains at all times fully obligated to perform its contract services at the airport, and provided that no such subcontract shall become effective unless and until it has been approved by the Director of Aviation and the Director of Public Service."

The Director of Aviation recommends:

That City Council enact the attached ordinance authorizing the execution of the attached contract on behalf of the City of Houston.

/s/ JOSEPH A. FOSTER
Joseph A. Foster

JAF:CFW:br
Attach.

APPENDIX E

GREATER HOUSTON
TRANSPORATION COMPANY
1406 Hays St., Houston, Texas 77009, 222-1481

February 11, 1970

Dear Sir:

On the 11th. day of February, 1970 our company entered into a contract with the City of Houston to furnish taxicab service at the Houston Intercontinental Airport.

According to our contract we are granted the right—

> "To allow other taxicab companies operating taxicabs licensed by the City of Houston to operate under this contract by sub-contracting with the Concessionaire, provided the Concessionaire remains at all times fully obligated to perform its contract services at the Airport, and provided that no such sub-contract shall become effective unless and until it has been approved by the Director of Aviation and by the Director of Public Service."

If your company desires to operate its cabs under this contract please notify us at your earliest convenience so that we may discuss this further. If we do not hear from you by February 20, 1970, we will assume that you have no interest in operating under our contract.

Yours very truly,

GREATER HOUSTON TRANSPORTATION COMPANY

By: /s/ STANLEY DANBURG
Stanley Danburg
President

SD/ms

Adams Leasing Co., Inc.
2119 Jensen Dr.
Houston, Texas 77026
Attn: Alfred Adams, President

Allied Cab Company
5919 Brock
Houston, Texas 77023
Attn: Mrs. Glenn Ellyn Smith

Checker Cab Co., Inc.
5707 Edgemoor
Houston, Texas 77036
Attn: Billy Joe Walker, President

Coastal Cab Co.
7802 Helmers
Houston, Texas 77022
Attn: Roy J. Raia

Dudley Cab Co.
2034 Alta Vista
Houston, Texas 77023
Attn: Willie V. Dudley

Garza Shield Cab Co.
420 Redan
Houston, Texas 77009
Attn: Emmett Garza

Hillside Cab Company
8200 Woodward St.
Houston, Texas 77051
Attn: Sammy Fance, Jr.

Jacks Cab Company
3510 Sampson
Houston, Texas 77004
Attn: O. D. Simpson

J & J Leasing Co.
2609 Dowling
Houston, Texas 77004
Attn: John Jenkins

J & L Cab Company, Inc.
2711 Berry Road
Houston, Texas 77016
Attn: Kathleen Condry, President

J & R Leasing Co.
4503 Dowling
Houston, Texas 77004
Attn: Temple Johnson, President

Riverside Cab Company
2321½ Rosewood
Houston, Texas 77004
Attn: Winston Jones

Safety Cab Company
10406 Chadwick
Houston, Texas 77029
Attn: Carl Schroeder

Sunnyside Cab Company
4621 Bricker
Houston, Texas 77051
Attn: Paul Ballard

Sunset Taxi Line
3906 Daphne
Houston, Texas 77021
Attn: Ervin Butler

Texas Cab Company
2703 Tidewater
Houston, Texas 77045
Attn: James T. Smith, Jr.

Triangle Cab Company
2519 McGowen
Houston, Texas 77004
Attn: D. J. Smith & Temple Johnson